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Enter

THE
CRIMINAL CASES
OF
SUTHERLAND'S
WEEKLY REPORTER,
IN TWO VOLUMES.

VOLUME I.
CONTAINING CASES FROM
THE GAP NUMBER AND VOLS. I. TO XIII
TOGETHER WITH
A GENERAL NOMINAL INDEX.

COMPILED BY
D. E. CRANENBURGH.

Calcutta:

PRINTED AND PUBLISHED BY D. E. CRANENBURGH,
AT HIS LAW-PUBLISHING PRESS,
NO. 57, BOW BAZAR STREET.

1891

CALCUTTA :
PRINTED AND PUBLISHED BY D. E. CRANENBURGH,
AT HIS "LAW-PUBLISHING PRESS,"
NO. 57, HOW BAZAR STREET.

PREFACE.

IN publishing a fac-simile reprint of the Weekly Reporter, which consists

(1) The Special Number, containing Full Bench Rulings	1862, 1863.
(2) The Gap Number	1864.
(3) Volumes I. to XXVI.	1864 to

I have struck off 1,000 extra copies of the criminal cases.

In each of the above volumes (except the Special Number, which does not contain any criminal ruling), the criminal cases are printed in one group, and have a separate paging, the pages in each volume being numbered consecutively—an arrangement which has enabled me to publish a fac-simile reprint of the criminal cases, that is, line for line and page for page. My fac-simile reprint consists of two volumes.

Volume I. contains cases taken from the following :—

Gap. Number 40 pages, numbered consecutively.

Vol. I. ... 51	"	"	"
II. ... 66	"	"	"
III. ... 70	"	"	"
IV. ... 41	"	"	"
V. ... 98	"	"	"
VI. ... 94	"	"	"
VII. ... 78	"	"	"
VIII. ... 96	"	"	"
IX. ... 72	"	"	"
X. ... 64	"	"	"
XI. ... 56	"	"	"
XII. ... 82	"	"	"
XIII. ... 82	"	"	"

TOTAL ... 990 pages, besides the nominal
[index.]

Volume II. contains cases taken from the following :—

Vol. XIV. ... 82 pages, numbered consecutively.

XV. ... 93	"	"	"
XVI. ... 70	"	"	"
XVII. ... 60	"	"	"
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XIX. ... 74	"	"	"
XX. ... 80	"	"	"
XXI. ... 91	"	"	"
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XXIII. ... 66	"	"	"
XXIV. ... 81	"	"	"
XXV. ... 81	"	"	"
XXVI. ... 8	"	"	"

TOTAL ... 940 pages, besides the general
[digest.]

The idea of publishing an extra number of copies of the criminal cases in a separate form was suggested by some members of the Calcutta Bar, one of whom has taken out the criminal cases from each volume of his set of the Weekly Reporter, and bound them in one volume, which he finds very convenient for reference. But as I have, in printing my edition, used

stout superfine paper, and as I have prepared for the work a consolidated nominal index and a consolidated digest, I found that the work would be very bulky and unwieldy if published in one volume. I have accordingly published the work in two volumes, entitled "The Two-volume Edition of the Criminal Cases of the Weekly Reporter." In my two-volume edition a criminal case can be found more easily than in the original volumes, because I have printed the words "Vol. I.," "Vol. II.," &c., in thick ~~bold~~ bold type in the outer margin of each page, showing to what volume each case belongs; and also because, while there are 27 nominal indices and 27 digests in 27 volumes of the original edition, my two-volume edition contains one consolidated nominal index and one consolidated general digest especially prepared for it, so that the name of any case in my nominal index, or any ruling in my general digest, can be found at a glance. Thus, instead of wading through 27 digests in the complete set of the Weekly Reporter to find out all the head-notes relating to murder, or defamation, or perjury, the reader will find in the consolidated general digest, under one heading, and in one group, all the head-notes on any required subject.

In my two-volume edition, the consolidated nominal index has been prefixed to the criminal cases of Volume I., and the consolidated general digest has been inserted at the end of Volume II.

D. E. CRANENBURGH.

October 7, 1891.

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RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 11th January 1864.

Present :

The Hon'ble G. Loch and C. Steer,
Judges.

Death—Pregnancy.

Criminal Referred Jurisdiction.

Queen versus Mussamut Ghurbhurnee.

Where a prisoner was pregnant, the sentence of death passed upon her was ordered not to be carried out until after her delivery.

THE Court, having perused the record of the trial, confirm the sentence of death passed upon the prisoner by the Sessions Judge. As the Sessions Judge states that the prisoner is pregnant, this sentence will not be carried out till such time after her delivery as is usual in such cases.

The 11th January 186

Present :

The Hon'ble G. Loch and C. Steer,

Witness (Examination of).

Criminal Appellate Jurisdiction.

Queen versus Sheik Kyamut.

In every Sessions trial, no matter how often the case has been before the Court, the witnesses must be examined *de novo* in the same manner as if the case were entirely new, and the witnesses had not been examined before.

To read to a witness his deposition on a former trial is not an examination of the witness in the presence of the accused. **Gap No.**

This prisoner was brought to trial with another by name Genda, when the case of the latter was remanded to the Zillah Court for further investigation. Genda had been tried and convicted; and when this Court had the case before it for confirmation of sentence, it was found that the investigation was not complete, and that it was necessary that further evidence should be obtained. Kyamut, though accused of the same crime as Genda, had not then been committed, but this commitment was made before the order of this Court, in respect of the other accused Genda, reached the Sessions Judge.

In the trial of Kyamut, the Sessions Judge, instead of recording the evidence of the witnesses in presence of the accused, had the recorded testimony taken in Genda's case read over to them; they were asked if they gave it, whether it was correct, and whether the prisoner was that Kyamut referred to by them.

This is not the mode in which, under the Code of Criminal Procedure, a trial ought to be conducted. Every trial requires to be held in the presence of the accused, before whom the complainant and every witness is to be examined. To read the deposition of a witness on some former trial to the witness is not an examination of the witness in presence of the accused as to his knowledge of the facts which form the subject-matter of the accusation; and a trial where evidence is thus taken is not a legal trial as ruled by this Court in another case. In every Sessions trial, no matter how often the case has been before the Court, the witnesses must be examined *de novo* in the same manner as if the case were entirely new, and the witnesses had not been examined before.

We quash the trial of the prisoner, and direct that he be re-tried in the mode indicated above.

Case No.

The 27th January 1864.

*Present:*The Hon'ble G. Loch and C. Steer,
Judges.

Murder—Intention.

Criminal Referred Jurisdiction.

Queen *versus* Shobha Sheikh Gorman.

Where the intention of causing death was not sufficiently established, a sentence of death was commuted to transportation for life.

In this case we think that the prisoner has been rightly convicted of murder, but we do not think it a case in which the extreme penalty of the law should be carried out; for, looking at the weapon made use of, and the evidence given by the witnesses, it appears to the Court that the intention of causing death has not been sufficiently made out. We, therefore, sentence the prisoner to transportation for life.

The 30th January 1864

*Present:*The Hon'ble G. Loch and L. S. Jackson,
Judges.

Land-disputes—Sundays.

Criminal Referred Jurisdiction.

Grijamonee *versus* Ishur Chunder.

In a case of disputed possession of land, the Magistrate should record the proceedings required by Section 318, Code of Criminal Procedure, and look to possession, not to right, i. e., maintaining in possession the party in possession, and forbidding disturbance of possession.

Magistrates should not take up judicial work on Sundays.

Loch, J.—A dispute likely to cause a disturbance of the peace regarding the possession of a Talook Brojobullubpore arose between Grijamonee on the one side, and Ishur Chunder on the other. The Magistrate found it necessary to bind over both parties to keep the peace; and, on the 30th August 1863, gave possession of the property to Ishur Chunder.

In his proceeding the Magistrate says: "To obviate this (disturbance), I have seen all three parties together. An arrangement cannot be come to. The Judge of Moorshedabad has issued an injunction to Ishur Chunder to administer to the estate. I, therefore, order possession to be given to Ishur, who was managing the whole estate for both Grijamonee and Prosonomoe till the latter died."

In her first petition to the Magistrate, Grijamonee charges Ishur Chunder, a discharged manager, with collecting men to disturb the peace. It appears, however, that Ishur Chunder claims to administer to the estate of Prosonomoe, the late proprietor of a 10-annas share in this property, Grijamonee having a 6-annas share. Ishur Chunder obtained a certificate under Act XXVII. of 1860 from the Judge of Moorshedabad, and, under the authority of that certificate, proceeded to make collections, and hence, apparently, this dispute arose.

The objections to the decision, embodied in the petition to the Sessions Judge, dated 3rd September 1863, are, *1st*, that the Magistrate drew up no proceeding as required by Section 318 of the Code of Criminal Procedure; *2nd*, that the case was decided on a Sunday; and, *3rd*, that the Magistrate has given Ishur Chunder possession of the whole property, whereas he admits the right of Grijamonee to a 6-annas share.

The Sessions Judge forwarded the proceedings to this Court with his letter of 17th December last, and requests the Court to reverse the proceedings of the Magistrate, as he considers the 1st and 3rd objections, taken by the appellant, valid; and, on the 2nd, he says that, though it may not be illegal to decide a case on a Sunday, it should be prohibited.

On the 1st and 3rd grounds, the order of the Magistrate must, I think, be reversed. If the Magistrate found it necessary to pass an order for possession, he should have proceeded strictly in conformity with the law, Section 318 of the Criminal Procedure Code, which he certainly has not done. Further, in giving possession of the whole property to Ishur Chunder, he has acted in opposition to the principle laid down in the above Section, which requires a Magistrate to look to possession, and not to right. Grijamonee appears to have been in possession of her share of the property. Ishur Chunder claims under a certificate from the Judge of Moorshedabad. At the most, he can only step into the shoes of Prosonomoe, whom he represents. He cannot interfere with Grijamonee.

On the second point, though it does not appear that appellants have suffered injury from having their case tried on a Sunday, yet, I think, the Magistrate should be prohibited from taking up judicial work on that day. As a police-officer, the Magistrate is frequently obliged to pass orders on

Sundays, and no objection can be taken to his proceedings. Parties charged with heinous offences may be brought in, and their immediate examination may be necessary for the ends of justice; and it is, therefore, obvious that all work on a Sunday cannot be prohibited. But, as a rule, the Magistrate should not sit as a Judicial Officer, and dispose of cases in the ordinary course of business on a Sunday, because, to put it upon no higher ground, Sunday is a recognized holiday throughout the country; and on that day judicial business is suspended in all the Courts, and parties might be put to great inconvenience if their cases were liable to be called up for hearing on that day at the caprice of a Magistrate, and much injustice might be done. It is a day on which there are no recognized office-hours, and were a Magistrate to make a summons returnable on a Sunday, and to dismiss the case for default, if the complainant were not present, it would, I think, be a sufficient ground for reversing such order that it was passed on a Sunday.

Jackson, J.—I concur in reversing the Magistrate's order, on the ground that it proceeds wholly upon an illegal ground, namely, that Ishur Chunder has received a certificate entitling him to administer to the estate (and is, therefore, entitled to possession), and not upon a finding after proper enquiry that one party or the other is actually in possession.

And it is manifest that this order must have been passed with very little consideration.

The possession of Ishur Chunder, as manager for the two ladies, was the possession of the ladies themselves, and could form no reason whatever for retaining him in possession, as against one of them on the demise of the other, to whose estate he may have been declared entitled to administer.

The order is also quite irregular in point of form, both as to the preliminary proceedings, and the shape of the order itself.

The proceedings required by Section 318 of the Act ought certainly to have been recorded, and the parties ought to have had notice that the Magistrate would proceed to hear and determine the case on a particular day.

To take up the case and pass final orders on a Sunday, without notice to the parties, was certainly improper: for, although necessity may compel a Magistrate to pass orders on that day, and they will not be null and void by reason of being passed on a Sunday,

yet the day is a *dies non*, upon which the Courts are not attended, and on which no man, without express notice, could suppose that his case was likely to be taken up.

And the order goes beyond the terms of the law, which authorizes the Magistrate only to declare the party whom he may decide to be in possession entitled to retain possession, and forbidding disturbance of possession.

The Magistrate in this case has ordered the police to give possession.

I also observe certain proceedings of the Magistrate, in taking bonds to keep the peace, which are not in conformity with Section 283 of the Code of Criminal Procedure.

And I must also record my disapprobation of the tone of the Magistrate's letter, in which he refuses to explain his conduct in deciding this case upon a Sunday.

The Judge having intimated his opinion that such a course was irregular, and it being certainly unusual, it was the Magistrate's duty to submit an explanation of the reasons which induced him to adopt that course, and not to fence with his superior in the manner exemplified in his letter.

The 30th January 1864.

Present :

The Hon'ble G. Loch, F. B. Kemp, and
L. S. Jackson, *Judges.*

Jurisdiction—False evidence.

Criminal Appellate Jurisdiction.

Queen versus Bhoohisan Mahatoon.

Committed by the Magistrate, and tried by the Sessions Judge of Moorshedabad, on a charge of giving false evidence.

A Sessions Judge is competent, under Section 435, Code of Criminal Procedure, to order the committal of a person, accused of giving false evidence, after the discharge of such person by the Magistrate, Section 359 notwithstanding (*Kemp, J., dissenting*).

Kemp, J.—THIS case has been tried with the assistance of a Jury.

It is contended that the Judge, in directing the Magistrate to commit the prisoner to take his trial upon a charge of giving false evidence, has exceeded his jurisdiction. It appears that one Imrit Lall was charged by his employer with embezzlement. The appellant in this trial gave evidence in that case, and Imrit Lall was committed, and

Gap No. tried and convicted by the Sessions Judge. The present appellant was not examined before the Sessions Judge on the trial of Imrit Lall, and therefore the offence of giving false evidence, if such offence has really been committed, was not committed before the Sessions Judge (*see* Section 172 of the Code of Criminal Procedure). The Sessions Judge, on perusal of a proceeding of the Deputy Magistrate, appears to have arrived at an opinion that the appellant had given false evidence in the Magistrate's Court, and he directed the Magistrate to investigate, and, if necessary, to commit.

The Magistrate acquitted the prisoner. The Judge, on the appeal of the employer of Imrit Lall, directed the committal of the prisoner, and overruled his plea of want of jurisdiction, quoting Section 435 of the Code of Criminal Procedure. I am of opinion that, under the provisions of Section 359 of the Code of Criminal Procedure, the Judge was not competent to direct the Magistrate to investigate and commit for trial, as the prisoner did not give evidence before the Sessions Judge, and his case, therefore, does not fall within the purview of Section 172, and it is only in such cases that the Sessions Judge could take cognizance of the offence in the absence of a charge preferred by the Magistrate or other Officer specially empowered, under the Procedure Act, to make commitments to the Sessions Court (*see* Section 359).

I would quash the trial and conviction as illegal, and direct the immediate release of the prisoner.

The papers must go before another Judge.

Loch, J.—The appellant has been convicted of perjury. In a charge of embezzlement brought by his master against one Imrit Lall the petitioner gave evidence before the Deputy Magistrate. The charge against Imrit Lall was proved, and he was committed for trial, and convicted by the Sessions Judge. The petitioner did not give evidence at the trial, but the Sessions Judge, on perusal of his evidence before the Deputy Magistrate, considering that perjury had been committed, directed the Magistrate to investigate the case with a view to commitment. The Magistrate considered the charge not proven, and acquitted the prisoner; and the Sessions Judge then ordered his commitment to the Sessions under the provisions of Section 435 of the Code of Criminal Procedure.

By Section 359 of the Code of Criminal Procedure, a Court of Session can, as a Court of original criminal jurisdiction,

take cognizance only of cases referred to in Section 172; but under the provisions of Section 171, a Court of Session, when of opinion that there is sufficient ground for investigating any charge mentioned in the three preceding Sections, may send the case for investigation to any Magistrate having power to try, or commit for trial, the accused person for the offence committed, and the Magistrate shall thereupon proceed according to law. Now, among the offences enumerated in Section 169 of the Code of Criminal Procedure, is perjury or giving false evidence under Section 193 of the Penal Code, and as this offence can only be tried by the Sessions Judge, he was competent, under the provisions of Section 435 of the Code of Criminal Procedure, to order the committal of an accused person discharged by the Magistrate.

It appears also that the employer of Imrit Lall is engaged in carrying on this prosecution. This he could not do under Section 169 without permission; but the Sessions Judge's order, directing the investigation, may, I think, be considered tantamount to a permission to prosecute even if no permission were given to him direct. I do not think, therefore, that the Sessions Judge has acted without jurisdiction in this case, and consequently the conviction of the Jury must stand.

Jackson, J.—I concur with Mr. Justice Loch. Section 169 of the Code of Criminal Procedure provides that certain offences shall not be enquired into without the sanction of the Court in or against which the offence was committed, or of some other Court to which such Court is subordinate.

The Sessions Court was a Court to which the Magistrate was subordinate, and the Sessions Court sanctioned the prosecution. The charge could, therefore, be entertained. But the Magistrate having discharged the accused person, the Sessions Judge could, and did, direct the Magistrate to commit under Section 435. His power under that Section is quite clear. Mr. Justice Kemp refers to Section 359 of the Procedure Code. That Section, it seems to me, only forbids a Sessions Court from taking cognizance of offences, except on a charge preferred by a Magistrate. But, then, the Sessions Court could, as we have seen, direct a commitment, which is directing a charge to be preferred by a Magistrate; and on the charge so preferred, the Court of Session could proceed to trial.

I think the conviction was right.

The 1st February 1864.

The 2nd February 1864.

Gap No.

Present :

The Hon'ble G. Loch and L. S. Jackson,
Judges.

Land-disputes—Personal property
—(Restoration of).

Criminal Referred Jurisdiction.

Ramjeebun Doobey *versus* Luchmonee
Dabea.

Reference, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Rungpore.

A Magistrate has no authority to restore to possession a person who has been illegally dispossessed. He must declare the party in actual possession entitled to retain possession until ousted by due course of law, and forbid all disturbance of such possession in the meantime.

If personal property, of which a person has been unlawfully deprived, come into the hands of a Magistrate, he may direct its restoration to the owner; otherwise the owner must sue for its value in the Civil Court.

Loch, J.—THIS is not a case that comes under the purview of Section 405 of the Penal Code, nor was it one in which the Deputy Magistrate should have interfered except to preserve the peace. Both parties claim the property as heirs of the deceased Ramjeebun Doobey; and if the defendant has ousted the complainant and taken possession, her remedy to recover possession is in the Civil Court under the provisions of Section 15, Act XIV. of 1859. As Act IV. of 1840 is no longer in force, the Magistrate has no authority to restore a person to possession. All that he can do in disputes likely to lead to a breach of the peace is to follow the course prescribed by Chapter XXII., Section 318, of the Code of Criminal Procedure, and, after enquiry, declare the party whom he finds in actual possession entitled to retain possession until ousted by due course of law, and forbid all disturbance of such possession in the meantime. With regard to personal property, of which a complainant has been forcibly or illegally deprived, we think a Magistrate might order its restoration to its owner if it come into his hands, but otherwise the complainant must seek to recover it or its value through the Civil Court.

Present :

The Hon'ble L. S. Jackson, *Judge.*

Charge (of Judge)—Offence by public servant
(Section 217, Penal Code).

Criminal Appellate Jurisdiction.

Queen *versus* Abdool Juleel.

Tried by Mr. E. F. Lautour, Sessions Judge of Patna, on a charge of taking a gift in order to screen an offender from legal punishment.

A Judge may give the Jury his opinion of the guilt or innocence of the prisoner, if he shows them clearly that the decision rests with them.

It is only necessary for a conviction under Section 217 of the Penal Code to show that the prisoner knew that the person he released was in danger of punishment, and that the prisoner released such person with the intention of saving him.

THE prisoner, having been convicted by a Jury, can appeal only on points of law. His pleader, Mr. C. Gregory, urges that the Judge's direction to the Jury is irregular, inasmuch as it intimates broadly the Judge's opinion of the prisoner's guilt, whereas, according to Mr. Gregory's contention, the Judge could lawfully do no more than recapitulate the evidence on both sides, and say whether he thought the witnesses trustworthy.

If he could do this, and if it be admitted there was evidence to go to the Jury, it is clear that he could in that way virtually say whether he thought the prisoner guilty or innocent.

In fact, however, the Code of Criminal Procedure does not prohibit the Judge from giving the Jury his opinion, provided he shows them, as the Judge did in this case, that the decision rested with them, and that they could decide as they thought proper.

Nor does it appear to me objectionable that the Judge should assist the Jury with his opinion. In the matter of sifting evidence and of weighing probabilities, he has probably had more experience than they, and I see no reason why they should not have the benefit of that experience.

In the case before me, I do not consider the Judge's view was expressed more strongly than the evidence warranted, if I may judge by his notes, as the original record is not here.

And, in fact, it is clear that the Jury were not carried away by the Judge's opinion,

Gap No. as he strongly stated his opinion that the prisoner might be convicted on three counts, whereas they have convicted him on one only.

Mr. Gregory next urged that, before a public servant could be convicted under Section 217 of the Indian Penal Code, of knowingly contravening Section 160 of the Code of Criminal Procedure, it must be shown that he knew the person released to have committed some offence, so that, unless released, he would certainly be punished.

I think all that is necessary to show is that the person in custody, and afterwards irregularly released by the prisoner, was in danger of being subjected to legal punishment, and that the prisoner released him with the intention of saving him.

The Jury seem to have thought it was so in the present case.

It does not appear to me that any error in law has been pointed out in the proceedings of the Court of Session, and I reject the appeal.

The 2nd February 1864.

Present :

The Hon'ble G. Loch, L. S. Jackson, and Shumbhoonath Pundit, *Judges*.

Judgment (Reasons for).

Criminal Appellate Jurisdiction.

(*Miscellaneous Case*)

Queen *versus* Hurihar Churn Sing and another.

A Magistrate is not bound to give his opinion as to the character of the evidence in prolix detail; much less the Judge in confirming the sentence passed by the Magistrate.

Shumbhoonath Pundit, J.—THESE prisoners, having been convicted of riot, &c., and punished with six months' imprisonment by the Magistrate of Behar, appealed to the Sessions Judge, who upheld the sentence. Against this order, the prisoners have appealed to this Court.

It is said that there was some dispute regarding a watercourse between the prisoners and others of the village of Bombai and the two prisoners acquitted by the Magistrate and others of the adjoining village of Rampore, which dispute led to a riotous assembly with arms, and to a serious breach of the peace with wounding. There is reason to suspect that, perhaps, the people of Rampore first had done some acts likely to injure standing crops in the village of Bombai,

and that the people of the latter village afterwards caused waters of heaven, preserved in a reservoir of the village Rampore, to flow away to the injury of the crops in that village. While it is not clear whether the water from Bombai ever fell into the reservoir of Rampore, that the preservation of the water in the reservoir was at all opposed to the greater flow of the water from the watercourse flowing from Bombai towards a third village touching some lands of Rampore, or that the cutting open of the reservoir of the latter village was anywise necessary to make the water of the watercourse of Bombai flow more freely, it is proved that the people of this last village, before the commission of the crime for which the prisoners are punished, had actually a desire to draw water from their own village more freely than it was flowing before, that the people of Rampore had attempted to dam up the flowing down of the water from the watercourse of Bombai, on which the people of this village cut open the reservoir of Rampore. It is also clear that, at this very time, the people of Rampore had themselves cut a small outlet from their reservoir, in order to drain away superfluous water from it. For want of explanations regarding the points noticed above as those which are not clear, between the two series of facts mentioned afterwards as established, as well as between these and the former explained points, complete connection and proper relationship cannot be ascertained, and so the facts of the history of the case are not satisfactorily intelligible to my mind.

This, however, is not a matter which can by itself afford this Court any ground of interference against findings of fact, though there might be some ground to suspect, if the Lower Courts understood the facts only to the extent that I have been able to gather and no more, that, perhaps, on a thorough and clear understanding of all the facts connected with the case, the party of the prisoners possibly might not have been considered guilty to the extent they have been believed by the Lower Courts, or that the Rampore people might not have been considered so clearly entitled to be acquitted as they were held by the Magistrate. It is, however, certain that both the Lower Courts have tried the case of the prisoners as a case of right or wrong conduct of the people of two villages having some quarrel between them entirely irrespective of any particular notice of the individual guilt of the two prisoners. Throughout the judgments of

both the Courts, there is no allusion to the statements of the witnesses who describe these prisoners as present or as passing orders; no allusion to the slight difference that there is in the different depositions of these witnesses upon these two points, and no allusion whatever to the defence of *alibi* set up by these two prisoners.

In a criminal case, it would not perhaps be sufficient to state that finding these prisoners guilty is of itself sufficient to show that the evidence to the contrary, in support of the innocence of the prisoners, must have been, as a matter of course, disbelieved before any opinion could be pronounced regarding their guilt; or, in other words, by the fact of believing the prisoners guilty, their defence has necessarily been disallowed. The ends of justice may require that the evidence for the prosecution should be weighed jointly with the evidence for the defence, and sentence to be pronounced after both sides have been looked into. It would not, perhaps, be considered as any great imposition or hardship if the Judges punishing a person should, if required to give their reasons for believing evidence against a prisoner, be also directed to give some for disbelieving the counter-evidence offered by the latter in support of his own innocence.

It is not at all necessary, in the present state of the case, to look beforehand to the probable conclusions to which the Courts below may arrive on this point. The defence of *alibi* was pleaded before the Magistrate, and no distinct notice was taken of it. The fact was complained to the Sessions Judge, and he, too, is silent upon this matter, and I think that the ends of justice require that the Magistrate should be asked to take the defence into his consideration, and to pass a new order in *favor* of the prisoners if this examination leads him to this conclusion; that, if he thinks proper to uphold his previous order against the prisoners, he should be asked to state briefly his reasons for disbelieving the defence; that in this case, after the Magistrate has disposed of the case, the Sessions Judge be asked to examine, in the appeal of the prisoners formerly lodged before him, the evidence of the prisoners in support of their innocence, and to proceed as the Magistrate has been asked to do; and that the prisoners, immediately on a remand being ordered, be allowed to be released on bail until the final decision of the Sessions Judge, if there be any necessity for trying the former appeal to the Sessions Judge. The Magistrate may, at the same

time, be asked to state a little more fully the points regarding which I have said I am not quite certain. The case should go to a second Judge, and if my colleague agrees on the whole with my proposal, and be not prepared to go to the extent that I have proposed, or proposes some other course of proceeding, I would like to know his proposals that I may see whether I do not find reasonable grounds for being convinced of their propriety.

Loch, J.—A serious affray took place between the people of the villages of Bombai and Rampore, occasioned by the breaking down of a dam in Mouzah Rampore, which obstructed the flow of the water from the lands from the Mouzah Bombai.

The Joint Magistrate considered that the people of Bombai were the aggressors, they having, without jurisdiction, broken down the dam of Rampore; and therefore, releasing the people of the latter village, he sentenced those of the former village, against whom he considered the charge to be proved, to six months' imprisonment, and this sentence was confirmed on appeal by the Sessions Judge.

The prisoners have come up in appeal to this Court, on the ground that the Sessions Judge has failed to give any opinion upon the evidence for the defence; nor has he passed any opinion on the principal question which was before him, *viz.*, the part which the prisoners individually took in the affray. The pleader states that it is admitted that there was an affray, but the Sessions Judge only determined which party was justified in that affray, and he held the Bombai people to be in the wrong, because they cut the dam which the Rampore people had erected to retain the water in their own fields. That, however, was a question of a subsidiary character, important only for the determination of the relative guilt of the inhabitants of the two villages; but the primary question for him to determine was whether the prisoners were actual parties to the affray, and what part they took in it. That question has not been enquired into, nor has the Judge expressed any opinion as to the evidence adduced by the prisoners to prove an *alibi*.

It is admitted that there is evidence on the record to prove the charge against the prisoners, and the Joint Magistrate's proceeding, which enters at length into the cause of the affray, ends with these words: "I am clearly of opinion that they (the Bombai people) were the aggressing party, and their offence is aggravated by the nature

Gap No.

Case No. "of the weapons they chose to arm themselves with;" and then he finds the charge proven against the prisoners. The Sessions Judge also enters at length into the cause of the dispute, and agrees with the Magistrate as to the misconduct of the Bombay people, and finishes by saying, "I see no reason to question the Joint Magistrate's view of the evidence before him, nor the sentence he has passed, and reject the appeal." Both these authorities might, no doubt, have given their opinion as to the character of the evidence in greater detail, but it cannot be said, because that detail is wanting, that neither the Magistrate nor Sessions Judge has considered the evidence adduced by both parties. It is quite unnecessary for an Appellate Court, confirming the decision of a Lower Court, to enter into prolix detail, if it be satisfied by a perusal of the record that the proceedings below and the conviction are correct. I cannot perceive that such omission can form any legitimate ground of special appeal. I would reject the appeal.

Jackson, J. I concur with Mr. Justice Loch in refusing to disturb the orders of the Lower Appellate Court, which, it seems to me, cannot be touched in this instance.

This was a case in which certain persons were convicted before a Magistrate having jurisdiction of an offence under the Penal Code, and afterwards appealed to the Court of Session, which confirmed the sentence.

Section 428 of the Criminal Procedure Code provides that the orders of an Appellate Court passed in appeal shall be final, except as provided in Section 405 of the same Act. That Section enables this Court to call for the records of any case tried by any Court of Session for certain purposes, and declares that, if the Court be of opinion that the sentence or order is contrary to law, it shall reverse the same, &c.

And Section 439 provides that no trial in any Criminal Court shall be set aside, and no judgment passed by any Criminal Court shall be reversed, either on appeal or otherwise, for any irregularity, unless a failure of justice has been occasioned thereby.

The only matter complained of in this case is that, whereas the accused persons, or some of them, pleaded an *alibi*, the Magistrate and Sessions Judge have severally omitted to record their opinion on the evidence in support of that plea, although they have fully recorded their opinion respecting the evidence for the prosecution.

This objection, which, the petitioners' pleader contends, involves a defect of inves-

tigation so grave as to vitiate the whole proceedings, cannot, I think, be sustained.

The Criminal Courts, unlike the Civil Courts, are not bound to record the reasons for their judgments or anything beyond the finding, as exemplified in Chapter XXVI. of the Criminal Procedure Code; and the issue for trial before them is always the simple one—Is the prisoner guilty or not guilty of the offence with which he stands charged?

In the present case, strictly speaking, the prisoners did not plead an *alibi*, but pleaded not guilty, and endeavoured to convince the Magistrate that they were not guilty by showing that, at the time when the offence was said to have been committed, they were in another place, in which case it would be impossible for them to have committed the offence. The Magistrate, believing the evidence which declared them to have committed the offence, necessarily disbelieved the counter-evidence which declared them to have been in another place. I do not think it was necessary for him to say so in detail, still less was it necessary for the Sessions Judge, in confirming the sentence, to express any such opinion.

I think, therefore, the Court cannot interfere.

The 12th February 1864.

Present:

The Hon'ble W. S. Seton-Karr and L. S. Jackson, *Judges*.

Charge (of Judge)—Dacoity.

Criminal Appellate Jurisdiction.

Queen *versus* Bonomally Ghose and others.

Tried by Mr. A. Pigou, the Sessions Judge of Hooghly, on a charge of dacoity.

In a case of dacoity, the Judge should direct the jury to convict only if they find that all the prisoners had the intention of causing wrongful loss to the prosecutor.

Seton-Karr, J.—This is an appeal from a conviction of dacoity on a verdict by a jury, and the appeal can, of course, only be on a point of law.

It is urged by the Counsel for the appellant that the Judge misdirected the Jury in telling them that they must find the prisoner guilty of dacoity, *because* the evidence showed that five persons together conjointly committed robbery *with the intention of causing wrongful gain to Peezeer*. It is argued that the evidence shows clearly that there had been some dispute between the plaintiff and Peezeer, who are closely connected with each other, and that it is not shown by that evidence, neither is it deducible therefrom, that all five persons went to the spot with the deliberate intention of causing wrongful gain to Peezeer. Some of them at least, and indeed every one but Peezeer, may have very fairly believed that the two bullocks carried off really belonged to Peezeer, and should not, in the partition of the property, have been made over to the woman Saffee at all. Therefore, in not putting this point of the knowledge and intention on the part of the appellants forcibly to the Jury for their consideration, and in telling them that, if they believed the evidence (as they were quite competent to do, and of which they were the sole Judges), they *must* convict of dacoity, the Judge erred, and the appellants are entitled to the benefit of a misdirection.

A consideration of the main evidence and of the charge to the Jury leads me seriously to question the propriety of the conviction for dacoity. It certainly does sometimes happen that men who take the law into their own hands, as in this case, or who commit illegal acts, may eventually find themselves involved technically in serious crimes known to the law, from which they find it difficult to escape; and it was unquestionably wrong of Peezeer to resort to force for the abduction of the two bullocks, and in Bonomally especially to strike the plaintiff a violent blow.

But the facts disclosed by the evidence will never lead me to the conclusion that the offence of which these appellants are guilty is dacoity in the sense in which that serious crime is practically understood and treated. Even if another Judge should hold that the strict and legal definition of dacoity does include these appellants, I still think that a sentence of seven years is quite disproportionate to their offence, looking to the origin of the same, as admitted by the plaintiff herself, and to the nature of the injuries received by the plaintiff, which, after all, are not excessive or permanent.

I should think that a sentence of six months' rigorous imprisonment on Peezeer and Bonomally would be quite sufficient, and of three months for the remaining prisoners. I would alter the conviction to one for causing hurt and for a common assault under Sections 323 and 352.

Jackson, J.—I agree that the Judge ought to have put it clearly to the Jury to find whether or not all the persons engaged in the commission of this offence had the intention of causing wrongful gain to the prisoner Peezeer, or wrongful loss to the prosecutrix; more especially as this is a case which can only be called a dacoity by the most rigorous application of the terms of the Penal Code. It is more than possible that the Jurors might have found that the persons who accompanied Peezeer on this occasion were under the belief that he was claiming property to which at least he believed himself to have a just title.

The act of the prisoners would not the less have been highly unlawful, but it would not have been dacoity if the Jury had so found.

We cannot, however, it seems to me, under such circumstances, take to ourselves the functions of the Sessions Court and Jury, and alter the conviction as if the Judge had correctly charged the Jury, and they had found under his direction something less than dacoity.

If the finding of dacoity is to be got rid of, or to be re-opened, I think the only course would be to order a new trial under the concluding words of Section 405, Criminal Procedure Code. But the appellant's Counsel does not ask this course to be taken, and informs me that he would prefer that the conviction should stand accompanied by the Court's remarks, and that a mitigated sentence should be passed.

Upon these grounds I concur in passing, in substitution for the sentence passed by the Court of Session, that proposed by Mr. Justice Seton-Karr.

Rep No.

The 18th February 1864.

Present:

The Hon'ble C. Steer, W. S. Seton-Karr,
and L. S. Jackson, *Judges.*

False evidence—*Locus penitentim.*

Criminal Appellate Jurisdiction.

Queen versus Gullie Mullick and another.

Tried by Mr. O. Toogood, the Sessions Judge of Cuttack, on a charge of giving false evidence.

Held by the majority of the Court (Jackson, dissenting) that there ought to be a *locus penitentim* for witnesses, who have deposed falsely, retracting their false statements.

Seton-Karr, J.—This is not a satisfactory case. The prisoners were witnesses in a case of culpable homicide, which resulted in the conviction of one of the two persons arraigned on culpable homicide not amounting to murder.

The present appellants, after having given evidence in support of the prosecution, admitted they had not seen what they had professed to see. On this the Sessions Judge tries and finds them guilty of having given false evidence, which might have led to the conviction of the persons charged with culpable homicide, on a capital offence. Unquestionably, had the charge of culpable homicide utterly broken down, this would have been a very serious offence; but, as the Judge, in his separate finding, which accompanied the present appeal, did convict one of

appellants were instrumental in getting up a false case, but that they either committed the offence of lending themselves to the support of a charge undoubtedly true, but of which they could know nothing positively, or that, for some motive favorable to the persons accused of the capital offence, they retracted their statements, or that at last from fear of punishment, or from qualms of conscience, they thought fit to speak the truth. The latter view may fairly, I think, be taken in this case.

In any view, the case against them is not of the same grave complexion as if, on some charge utterly without foundation, they had lent themselves to work the ruin of an enemy or a neighbour; and I must hold, as we have held in similar cases, that there ought to be a *locus penitentim* for persons so circumstanced, and that it is better that a witness should on cross-examination admit the falsity of his previous deposition than that he should persist in swearing to his falsehood. According to the Judge's view of the case, these appellants had much better have stuck to their falsehood to the end, in which case apparently nothing could have been done to them, nor would the case against the men arraigned for murder have been in any way altered.

In this view, not deeming the Judge to have at all borne out his conclusion as to the extreme gravity of the offence of which he has convicted the appellants, and holding that men should not speak with a halter round their necks, but should be encouraged to tell the truth even at the eleventh hour, I would, as a sufficient punishment for the false swearing which they did at last retract, and as a warning to others, reduce their sentence to six months' rigorous imprisonment.

Jackson, J.—I think the prisoners ought not to have been convicted under the 195th Section of the Penal Code.

They gave false evidence before the Magistrate in a preliminary enquiry of which evidence the immediate effect was to cause the accused persons to be committed for trial.

retraction of this false evidence before the Court of Session appears to negate the intention of procuring the accused persons to be convicted. I would, therefore, alter the conviction to one of giving false evidence in a judicial proceeding punishable under Section 193.

I think the sentence passed by the Court of Session to be, under the circumstances of the case, excessive, yet I cannot concur in so large a reduction as that proposed by Mr. Justice Seton-Karr.

It appears to me rather a dangerous doctrine that a man may falsely depose before a Magistrate that he has seen A B commit murder, and that, by availing himself of a *locus penitentim* at the trial, he may have his punishment reduced to an almost nominal penalty.

I think the promulgation of such a doctrine would go far to embolden persons to swear falsely before Magistrates, because they could afterwards judge whether it would be safe to persist in the perjury or to recant.

And in such a case the false witness might die before the trial, or might remove himself to such a distance that his attendance could not be procured at the trial, in either of which cases his deposition (if it had been duly taken in the presence of the accused) would be read as evidence at the trial, and the accused person might be convicted mainly upon it.

No doubt, if in such a case it appeared that the witness, when called at the trial, had, from the prickings of conscience, determined to tell the truth, that circumstance might be accepted as an indication of his desire to make all possible amends for the wrong he had done, and might be considered in mitigation, as the restoration of ill-gotten property has been considered in cases of criminal breach of trust; but it seems to me eminently unsafe that a witness, deposing on facts of vital importance, should be in any degree encouraged to depose falsely by the contemplation of his *locus penitentiae* at the trial.

It is said that, if we do not hold out this chance, false witnesses will not retract, but will persist in their false statements; but of this, I suppose, we must take our chance. We have not one scale of punishment for confessing offenders, and another for those who plead not guilty, although, in many cases, the conviction would be impossible without the confession.

I think it better to check perjury at the outset by making men feel that, by giving evidence false but retractable, they expose themselves to the full penalty for that offence than to improve the chances of convicting them by holding out a motive to retract.

For these reasons I cannot think it right to pass a less sentence on the prisoners than rigorous imprisonment for three years.

Steer, J.—I have in other cases held such a decided opinion as to the danger of punishing witnesses for giving false evidence, because they do not adhere before the Sessions to the statements made by them to the Magistrate, that I would

rather that my colleague, Mr. Justice Seton-Karr, had proposed to exempt the prisoners from any further imprisonment than what they have already undergone. As, however, both Mr. Justice Seton-Karr and Mr. Justice Louis Jackson concur in awarding some punishment to the prisoners, and only differ as to the measure, I can, with the views I hold, take no other course than give my voice in favor of the most lenient sentence.

The 19th February 1864.

Present :

The Hon'ble C. Steer,

Right of private defence.

Criminal Appellate Jurisdiction.

Queen versus Nowabdee and others.

Tried by Mr. W. B. Buckle, Sessions Judge of Backergunge, on a charge of rioting.

The right of private defence cannot be pleaded by persons who, believing they will be attacked, court the attack.

THE facts found are that prisoners 93 and 94, having reason to apprehend an attack, stood outside their house. Presently the attacking party came, when words arose, and then blows followed on both sides. Those who attacked are, no doubt, guilty in the greatest degree, and they have been properly punished more severely than the other side. This side are not without blame also, as it seems they courted the attack, and instead of staying within doors when, if their house had been attacked, they would have had a right of defence, they went outside, and there met the assailants. I see no reason to interfere with the sentence passed on each side respectively, and the appeal is accordingly rejected.

Case No.

The 22nd February 1864.

The 22nd February 1864.

Present :

The Hon'ble C. Steer and W. S. Seton-Karr,
Judges.

Possession of forged document.

Criminal Appellate Jurisdiction.

(Queen *versus* Lokenath Shaha.

Tried by Mr. F. B. Simson, Officiating Sessions Judge of Mymensingh, on a charge of having possession of a document knowing it to be forged with intent to use it as genuine.

It is not sufficient for a conviction under Section 474 of the Penal Code to say that the prisoner might possibly have used an altered document. The guilty intent must be proved, not inferred.

Seton-Karr, J.—We are of opinion that this conviction cannot be sustained. Taking all the facts as found by the Judge, and even admitting that the prisoner did know that erasures and alterations had been made in the date of his petition, we hold that the Judge was not justified in drawing the inference which he did draw as to the guilty intent. The words used in Section 474 are copulative, and not *sejunctive*, “knowing the same to be “forged, *and* intending that the same shall be “fraudulently or dishonestly used as genuine, “&c.” It is not sufficient for conviction to say that the prisoner might possibly have used the altered document in his defence in the civil suit in the Moonsiff's Court.

This is mere suspicion or surmise, and cannot be converted into a legal presumption of guilt in such a case, looking to the conduct of the prisoner, who appears to have readily returned the petition to the Magistrate when asked for it.

We annul this conviction, and direct the prisoner's release.

Present :

The Hon'ble C. Steer and W. S. Seton-Karr,
Judges.

Abetment of murder—Kidnapping—Rioting.

Criminal Appellate Jurisdiction.

(Queen *versus* Askur and another.

Tried by Mr. W. B. Buckle, Sessions Judge of Backergunge, on a charge of abetment of murder, kidnapping, &c.

There can be no conviction for abetment of murder without proof of murder.

A husband or those who aided him cannot be convicted of kidnapping for taking away his own wife, but they are guilty of rioting, if they carry out the husband's object of getting possession of his wife by force and violence and in the darkness of night.

Steer, J.—THE case against the prisoners as held to be proved by the Sessions Judge is this :—

One Bholaie was married to a girl named Poornee. She, being too young to cohabit with him, continued to live with her mother, the prosecutrix. Bholaie was not satisfied with this arrangement, but the prosecutrix could not be prevailed upon to give the girl to her husband. Bholaie, determined to get her, associated with him his brother-in-law Towfeer, the prisoners and others, and these all, at 4 o'clock in the morning, went to the prosecutrix's house, and carried off the girl. They were seen by several persons carrying off the girl, but no one saw her afterwards, and a head and some bones of a child were some days afterwards found, which the mother and others have identified as those of the girl Poornee. These are the bare

facts of the case as established by the evidence, and upon these the Sessions Judge holds the prisoners guilty, *1st*, of abetment of murder; *2nd*, kidnapping Poornee; *3rd*, riot; *4th*, house-trespass; and sentences them, on the first charge, to transportation for 14 years. There is no evidence of any kind to show that Poornee was murdered. That she is dead is probably the case, but how she died, or that she died a violent death, is not shown by a particle of evidence. The conviction for abetment of murder cannot, therefore, stand.

Nor do the circumstances, under which the girl Poornee was taken away, establish the offence of kidnapping. She was taken away by her own husband, and a husband may certainly be presumed to have believed in good faith that he was entitled to the lawful custody of his own wife. Therefore, if the offence of Bholai was not kidnapping, neither can it be kidnapping in the prisoners, who only aided Bholai. The conviction upon this charge we also hold to be bad.

But we think the charge of rioting is made out, for, though Bholai had a legal right to the possession of his wife, the object ought to be legally carried out. It was not a legal way of carrying out Bholai's object of getting possession of his wife to do so with force and violence and in the darkness of night, and it is entirely owing to this illegal mode of carrying out an otherwise legal object that it has come to pass that the fate of the girl Poornee remains a mystery.

The conviction for riot resting on legal grounds, we uphold the conviction and the sentence of two years' rigorous imprisonment and a fine of 50 rupees, which the Sessions Judge has awarded against each of the prisoners.

The 22nd February 1864.

Present :

The Hon'ble C. Steer and W. S. Seton-Karr,
Judges.

Witnesses (Examination of).

Criminal Appellate Jurisdiction.

Queen versus Afiazuddeen and another.

Tried by Mr. W. B. Buckle, Sessions Judge Gap No. of Backergunge, on a charge of rioting.

It matters not how often the same offence is the subject of a Sessions trial, but every accused has a right to have the whole of the evidence given and recorded in his presence just as if the witness had never before given his testimony on the charge.

Steer, J.—IN this case the Sessions Judge has not taken the evidence of the witnesses afresh in the presence of the accused as to the facts upon which the charge against them rests: but having the witnesses before him, he allows them to identify the prisoner as the party alluded to by them in some former trial of some other person. This is a highly improper and an illegal way of taking evidence, and it does not appear that the depositions of the witnesses formerly given were even read over to the witnesses on the trial of the prisoners. As often remarked by this Court, it matters not how often the same offence is the subject of a Sessions trial; every accused has a right to have the whole of the evidence given and recorded in his presence, just as if the witness had never before given his testimony on the charge.

The trial must, therefore, be quashed, and the case remanded to the Sessions Judge for a new trial.

The 24th February 1864.

Present :

The Hon'ble C. Steer and W. Morgan,
Judges.

Illegal marriage—Abetment.

Criminal Appellate Jurisdiction.

Queen versus Kudum and others.

Tried by Mr. W. B. Buckle, Sessions Judge of Backergunge, on a charge of marrying during the lifetime of a husband, &c.

Proof of dishonest or fraudulent intent is necessary for a conviction under Section 495 of the Penal Code of falsely going through the ceremony of marriage.

Jap No. The mere act of allowing the marriage to take place at one's house does not amount to the abetment of an illegal marriage.

Steer, J.—It seems pretty clear that the woman Arabjan, having a husband alive, did contract a second marriage with Kudum Gazee, the ceremony taking place in Sheikh Omer's house. She says she was divorced, but no evidence was given of this, nor did the Judge question the first husband on this important plea, though the husband was examined as a witness on the trial.

On the above facts, the Judge has convicted Arabjan under the 494th Section of the Penal Code of marrying again during the lifetime of her husband, and sentences her to rigorous imprisonment for three years.

He has convicted Kudum Gazee and Arabjan of having dishonestly and with a fraudulent intent gone through the ceremony of being married, knowing that they were not thereby lawfully married, and he sentences Kudum to three years' rigorous imprisonment, and imposes on him a further fine of 30 rupees. He has convicted Omer of having abetted the commission of the above offences, and he sentences him to be rigorously imprisoned for three years, and to be fined 20 rupees.

In respect to the finding against Kudum and Omer, we think the Judge is altogether in error. Kudum Gazee may have contracted the marriage, knowing that Arabjan's husband was still alive; but unless he did it dishonestly and with a fraudulent intent, as explained by Sections 24 and 25 of the Penal Code, he has not committed the offence described in Section 496, under which the Judge has convicted him, and there appears to have been neither a dishonest nor fraudulent intent on his part according to the meaning attached to those words.

Then as to Omer, even allowing that he knew Arabjan was already married, and that she had not been divorced, the mere act of his allowing the marriage to take place in his house does not amount to the abetment of an illegal marriage, as the law construes abetment. The Section which comes nearest to his case is Section 120 of the Penal Code, but inasmuch as it was not his duty to give notice of the intended marriage, or to put a stop to it, neither does this Section apply to him. In the case, then, of both

these prisoners, we reverse the conviction.

Arabjan has probably committed the offence of which the Judge has convicted her, but seeing that her husband has cast her off for some years, during which time she has had a child by another man, which event, together with everything else connected with his wife, he seems to have treated with the utmost unconcern, we think that, though, in the eye of the law, Arabjan has committed an offence which is punishable by imprisonment, she is deserving of a very small measure of punishment. Having been in jail since the 22nd August last, we consider that she has been punished as much as she deserves, and we accordingly annul the rest of her sentence.

The 29th February 1864.

Present :

The Hon'ble C. Steer and W. S. Seton-Karr,
Judges.

False evidence.

Criminal Appellate Jurisdiction.

Queen versus Govind Sahoo.

Tried by Mr. O. Toogood, Sessions Judge of Cuttack, on a charge of giving false evidence.

The denial of one's relationship to his brother, whose witness he was, was held to be a kind of false evidence meriting only a mild punishment.

Steer, J.—THERE is no doubt that the prisoner has committed the offence of making a statement that was false, and his object would seem to be that, by denying his relationship to his brother, whose witness he was, his statement would have more weight. This kind of false evidence is, in my opinion, the mildest form in which false evidence can be given, and I would not, therefore, visit this offence with a measure of punishment suited to the offence in its worst form.

I would reduce the sentence from three years to six months.

Seton-Karr, J.—I fully concur. A sentence of three years is out of all proportion to the offence.

The 2nd March 1864.

Present:

The Hon'ble W. S. Seton-Karr and L. S. Jackson, *Judges*.

False evidence.

The Queen *versus* Chota Jadub Chunder Biswas.

Committed by Mr. W. S. Wells, Magistrate of Bancoorah, and tried by Mr. G. C. Fletcher, Sessions Judge of West Burdwan, on a charge of intentionally giving false evidence.

Where a plaintiff before a Moonsiff came and petitioned the Judge, complaining that the Moonsiff had improperly refused to examine his witnesses, and had dismissed his suit, although informed that witnesses were in attendance, and the Judge, upon examining the petitioner upon solemn affirmation, and finding the charge unproved, ordered proceedings to be taken against the petitioner for giving false evidence.—HELD that the Judge had no authority to examine the petitioner upon oath in such a case, and that the oath having been made, and the evidence given *coram non judice*, could not form the subject of a prosecution for false evidence.

Jackson, J.—THE prisoner has been convicted of giving false evidence in a stage of a judicial proceeding.

The so-called evidence was given before the Civil Judge of the district under the following circumstances:—

The prisoner, who had been plaintiff in a civil suit before one of the District Moonsiffs, came before the Judge, and complained by petition that the Moonsiff had improperly refused to examine his witnesses, and dismissed his suit, although informed that the witnesses were in attendance.

The Judge hereupon examined the petitioner upon solemn affirmation, and, finding the charge unproved, ordered proceedings to be taken against him for giving false evidence.

It appears to me that the Judge had no authority to examine the petitioner upon oath in such a case; that the oath was therefore made, and the evidence given, *coram non judice*; and that, consequently, they cannot form the subject of a prosecution under Section 193 of the Penal Code.

I, therefore, think the conviction erroneous, and the prisoner entitled to an immediate release.

I have not come to this conclusion without an attentive consideration of all the provisions on this subject discoverable in the Regulation Law, or without hearing what the Government pleader had to urge. I have also consulted several of my learned colleagues.

Seton-Karr, J.—Looking to the circumstances under which the charge was preferred against the Moonsiff by the appellant, I think that the correct course would have been for the Moonsiff, if aggrieved, to have brought an action for defamation under Section 499 of the Penal Code, or to have sued civilly for damages. Judicial officers, if they have been unjustly aspersed, and if they have grounds of complaint, are entitled to some protection or redress. But on the facts and for the reasons mentioned by Mr. Justice Jackson, I concur in the release of the appellant. The Judge should not have taken up the case, and committed and tried it as he did.

The 8th March 1864.

Present:

The Hon'ble Shumbhoonath Pundit, *Judge*.

Charge (of Judge).

The Queen *versus* Mahadeo.

Convicted by the Sessions Judge of Patna, on a charge of culpable homicide not amounting to murder.

Where different trials are held at different times and against different prisoners in respect of the same crime, a new charge, specifying the particulars required by Circular Order No. 5, dated 6th February 1863, should be delivered in each case.

THIS is a case of a prisoner tried for a crime for participation in which other prisoners have already been tried and punished before by the same Sessions Judge who has now passed sentence against the present prisoner.

In the present case, the Judge did not give a new charge to the Jury trying the case, but only read over to them his charge to the former Jury.

This is evidently illegal; and, if I had been satisfied that the prisoner has any how suffered by this proceeding of the Judge below, I would have tried to see whether the trial could not be quashed at all for this defect. It is, however, clear that, as regards this case, it would have taken as much time and labor to give a new charge as it took to read out the former charge; and that also the former charge, on the whole, was applicable to the present suit. As the sentence has by this time expired, and as putting the prisoner to undergo a new trial will only put him in fresh uneasiness, I do not like to interfere. The Sessions Judge is, however, to be requested to deliver formally a new charge

Case No. in such cases as the present, and, when delivering judgment, to specify the particulars required by the Circular Order No. 5, dated 6th February 1863, as he had done in the former case.

The 14th March 1864.

Present:

The Hon'ble G. Loch, C. Steer, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

False evidence.

The Queen versus Anoo and another.

Committed by Mr. G. C. Kilby, Deputy Magistrate of Nassirnuggur, and tried by Mr. A. A. Swinton, Sessions Judge of Tipperah, on a charge of intentionally giving false evidence, &c.

Held by the majority of the Court that a sentence of 5 years' imprisonment was not excessive in the case of a man convicted of making a false statement in a judicial proceeding, with the intention of defeating the ends of justice by procuring the acquittal of a guilty person.

Steer, J.—A CHARGE was made against Torikollah that he had eaten a stray one-eyed bull. Torikollah in that case made answer that he had not killed or eaten the bull, but that he had made it over to the owner Anoo. 'This Anoo was sworn, and he stated that he had received the beast from Torikollah in the presence of Nazir and Shorafat. Anoo, when asked where the bull was, said it had died. As his wife and son had told the police that Anoo never had such a beast, the Magistrate sent for the wife and all the males of the village in which Anoo lived, to question them as to their knowledge whether Anoo ever had such an animal. They denied that Anoo ever had such a bull as that he said he received from Torikollah; and upon that Anoo, seeing the proof of his falsehood, is said to have confessed his guilt.

Upon these facts, the Judge finds Anoo guilty of perjury in saying falsely that he received a one-eyed bull from Torikollah, and he finds Torikollah guilty of having used as true and genuine evidence the evidence of Anoo, knowing it to be false.

The confession of Anoo before the Magistrate is not with the record, but a memorandum of it in the Magistrate's hand is. It is not, however, on his confession alone that Anoo was committed for trial, but on the evidence of his wife and of his fellow-villagers, that he never had such a bull as that which he affirmed he received from Torikollah.

Does this prove that what he said as to Torikollah having given him a one-eyed bull is false? It might be that his witnesses failed to prove that he had previously possessed a one-eyed bull, but does that negative the assertion that he received a one-eyed bull from Torikollah? Certainly, if he never possessed a one-eyed bull, the animal of that sort which he did receive from Torikollah could not have been his, and, in this respect, his statement may be false; but this is not the false statement of which the Judge has convicted him. Therefore, it seems to me that there is no evidence to support the Judge's finding against Anoo, and he ought to be acquitted.

The Judge has found that Torikollah made use of the false evidence of Anoo, which is manifestly an error; for he has made no use of it at all. He made his own statement and got Anoo to support him, but he made no further use of Anoo's statement. The offence, then, of which Torikollah is guilty, if he is guilty at all, is not the offence of using Anoo's false evidence, but of instigating Anoo to give false evidence. If there is proof of this, he is guilty of abetting Anoo to give false evidence.

The Magistrate says that it was clearly proved that the bull was killed by Komoruddeen in the presence of Torikollah. If this was so, this fact would convict both Anoo and Torikollah; but this evidence is not sent up to the Sessions. Therefore, the only ground for inferring that Torikollah did not give the bull to Anoo is the evidence of Anoo's witnesses that they never saw him possessed of such a bull.

This can never be considered sufficient evidence that Torikollah did not, in fact, give the one-eyed bull to Anoo; and this is the false statement which the Judge convicts the prisoner Torikollah of having made corrupt use of. If there is no proof that it is false, there is no offence, and there has, in fact, been none. I would, therefore, acquit this prisoner also.

It should, I think, be brought to the notice of both the Deputy Magistrate and the Judge that, in such a case as this, it is highly improper to call a wife to convict her husband of perjury; and, except in civil cases, a wife is not a competent witness for or against her husband.

Swinton, J.—I concur in reversing the conviction of the appellant Torikollah. The charge against him was not correctly framed, and I do not think that the evidence

would support the proper charge, *viz.*, that he instigated Anoo to give false evidence. What Torikollah said in the first instance was merely said in his own defence.

As regards Anoo, his statement as to the receipt of the one-eyed bull is manifestly false, and he has admitted that he spoke falsely, for his answer, as recorded in the brief memorandum of the Deputy Magistrate, is tantamount to an admission of guilt. This answer, however, contains nothing about the hope of any reward being the motive for the falsehood. I do not think that Anoo ought to escape without some punishment, though I admit that 5 years seem excessive, compared with the character of the offence; and, looking to the fact that he did admit the falsity of his statement, I can here only repeat what this Court has ruled in several instances of late, *viz.*, that, if truth can be extracted from witnesses even at the 11th hour, we should not punish them with the same rigor, as we punish those who persist in their falsehood to the end, or who endeavor to ruin the character, or imperil the lives and liberties of their neighbours. In this view, I think the sentence of 5 years excessive.

We are not told what punishment was awarded to the men who made away with the bull, and who were separately tried; but, on the whole, I would reduce the sentence of Anoo to one year's rigorous imprisonment, looking to the probable object with which he swore falsely, for I infer that he chiefly intended to procure the release of Komoruddeen and Torikollah, and to make out that the animal had not been eaten.

Jackson, J.—My two colleagues have disposed of the case of Torikollah, and I have only to give an opinion as to the prisoner Anoo.

I concur with Mr. Justice Seton-Karr in considering this appellant to have been properly convicted.

The Sessions Judge finds him guilty of having falsely made the whole statement specified in the charge, and not merely of having falsely stated that Torikollah had made over to him the one-eyed bull.

The whole of the statement must be taken together, and the obvious intention with which it was made must be considered. That statement was (in substantial agreement with the words of the charge) that his (Anoo's) one-eyed bull having strayed, he (Anoo) had received it back from Torikollah, and that the beast had afterwards died of disease,

Gap No. That statement, made in a case when Torikollah was charged with having made away with a bull answering the above description, was obviously made with the intention of inducing the Court to believe that the animal traced to Torikollah's possession was not one belonging to the prosecutor in that case, and wrongfully made away with by Torikollah, but one belonging to Anoo himself, and properly made over to him by Torikollah.

Now, when the evidence established beyond a doubt that Anoo had never possessed such an animal at all, even if we suppose it to have been proved that Torikollah made over a one-eyed bull to Anoo, the evidence of Anoo will notwithstanding continue to be false with reference to its whole tenor, and bearing on the case in which it was given.

Besides, he seems to have admitted to the Magistrate that his entire statement was false.

I therefore think that he was quite properly convicted of the offence of giving false evidence in a judicial proceeding.

It also appears that he did so in expectation of receiving a money-reward.

We, therefore, have the case of a man who has committed a most deliberate act of perjury from the most sordid motive, and with the intention of defeating justice by procuring the acquittal of a guilty person.

I cannot find in these circumstances any ground for reducing the sentence to one of imprisonment for one year. It may be that five years is a term slightly in excess of the sentence which we might have been inclined to pass, but I am not at all sure that it is so; and, at all events, I see no reason for weakening the Judge's authority by a trifling mitigation. I would, therefore, confirm the sentence of five years' imprisonment.

Loth, J.—Komoruddeen and Torikollah were charged by one Jenab Ally with killing and eating a stray bull which had been made over by the villagers to Torikollah, the village-chowkeedar, to take to the pound.

In his defence Torikollah denied the charge, and alleged that he had made over the bull to its owner, one Anoo, in the presence of witnesses.

Anoo was examined by the Deputy Magistrate on the 2nd September, and he swore that the bull in question was his; that it had strayed in the month of Kartick; that, in the month of Ughran, he had discovered it at Mouzah Seydtola; that, on

his bringing witnesses to prove his title to the animal, it was made over to him by Torikollah, and that the animal died in the following way.

From the statement of the Deputy Magistrate, it appears that the charge against Komoruddoen and Torikollah was satisfactorily proved, but he has failed to submit any evidence of this fact in this case.

The witnesses called by Torikollah and Anoo to prove the delivery of the bull to the latter deny all knowledge of the transaction. Further, it appears from the evidence of the neighbours that Anoo never possessed such an animal as that in question, and, consequently, his statements of having lost and recovered the animal are altogether false; and, when examined by the Deputy Magistrate, with a view to commitment, he admitted that he had committed perjury, and that he had given the false evidence under promise of receiving 25 rupees from Korum Ally.

This false statement was knowingly made by Anoo for the purpose of effecting the release of Torikollah, and defeating the ends of justice; and I do not think that, under the circumstances, he has been too severely punished. I would uphold the sentence of the Sessions Judge.

The 15th March 1864.

Present:

The Hon'ble L. S. Jackson and E. Jackson,
Judges.

**Evidence (Mode of recording)—Section 195,
Code of Criminal Procedure.**

Committed by Mr. V. T. Taylor, Officiating Magistrate of Rungpore, and tried by Mr. F. C. Fowler, Sessions Judge of that District, on a charge of murder.

The Queen *versus* Muttee Nushyo.

A memorandum by a Judge that certain witnesses had deposed the same as the former witnesses is not in accordance with the requirements of Section 195, Code of Criminal Procedure.

E. Jackson, J.—We confirm the sentence of death passed upon the prisoner Muttee Nushyo, and direct that it be carried out without delay.

We would point out to the Judge that he has not, in accordance with Section 195 of the Criminal Procedure Code, made a memorandum of the substance of what the witnesses No. 4 and No. 5 depose to, as the examination of those witnesses proceeded. His memorandum is that those witnesses deposed as the former witnesses had. This is not a sufficient compliance with the law.

The 16th March 1864.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Appeal—Conviction by Superintendent of Cachar.

Convicted by Captain R. Stewart, Superintendent of Cachar, of criminal breach of trust.

The Queen *versus* Radhakissen Sein and another.

The High Court has no jurisdiction to hear an appeal from a conviction and sentence by the Superintendent of Cachar in his capacity of Magistrate of the District.

This is an appeal from a conviction and sentence by the Superintendent of Cachar in his capacity of Magistrate of the District.

The Court has no jurisdiction to hear such appeals, and the record must, therefore, be returned to the Magistrate to be submitted to the proper Court.

The 31st March 1864.

Present:

The Hon'ble G. Loch and E. Jackson,

Jurisdiction—Bail.

Committed by Baboo Judoonath Mullick, Moonsiff of Pubna, and tried by Mr. C. S. Belli, Sessions Judge of Rajshahye, on a charge of using evidence knowing it to be fabricated.

The Queen *versus* Jhaloo Sirdar.

A single Judge of the High Court may order the release of a prisoner on bail pending the hearing of an appeal.

Jackson, J.—The prisoner has been convicted of using as genuine evidence a fabricated bond, and has been sentenced to five years' imprisonment and a fine of 500 rupees, or an additional year's imprisonment.

The commitment was made by the Moon-siff of Pubna, in whose Court the bond had been produced as evidence by the prisoner in a suit preferred by the prisoner against Madaree Mundul and Bhoyrub Chunder Sircar. The action was brought to recover from the above-named defendants the amount due, principal and interest, on two other bonds executed jointly by them on the 30th Assin 1267. Madaree Mundul admitted the claim; Bhoyrub Chunder Sircar admitted that the bonds had been executed by Madaree Mundul and himself, but added that the greater portion of the debt had been paid, in proof of which he produced a receipt dated 11th Pous 1267, in the handwriting of the prisoner, for Rs. 122, to attest which he requested that the prisoner might be personally summoned. The prisoner accordingly attended. He admitted that he had written the receipt, but alleged that it had been given to Madaree Mundul on account of another bond which Madaree Mundul singly had subsequently executed in his favor on the 5th Aughran 1267, in proof of which he, four days afterwards, filed the bond, which it is now alleged he had forged. The bond, though dated in 1267, is written on a stamped paper which was purchased in 1268. The circumstance was at once discovered. Bhoyrub Chunder Sircar charged the prisoner with having, in collusion with his relation Madaree Mundul, fabricated this false bond. The Moon-siff decided the civil action by giving Bhoyrub Chunder Sircar credit for the sum paid in the receipt, and ordered that enquiries should be instituted as regards the forgery-bond, with the view of bringing the prisoner to trial. These enquiries were protracted in the Moon-siff's Court from July 1862 to April 1863, and they resulted in the prisoner's commitment to the Sessions Court.

The prisoner's defence is that the bond in question was found among his other bonds and papers which were in charge of his gomashtha, and had been filed by him under the belief that it was the genuine

bond which had been executed by Madaree; **Case No.** that he had since ascertained that the original bond had been lost, and that his gomashtha had substituted this false bond in its place. The gomashtha in question had lately died; but there was evidence brought forward to prove that the original bond had been lost, and Madaree Mundul deposed that the gomashtha had mentioned the fact to him, and asked him to execute another bond, but that he had refused.

The assessors were of opinion that this defence was true, and that the prisoner was not aware that the bond he was filing was not the real bond. The Judge, however, took a different view of the case, and, disbelieving the defence, convicted the prisoner.

The argument urged by the vakeels of the prisoner before this Court is that it is the highest degree improbable that the prisoner, who, it is admitted, is a wealthy muhajun, would deliberately file such a palpably false bond, which he must have known would be subjected to scrutiny, and which the smallest examination would at once prove to be false; and that, on the other hand, the defence set up by the prisoner is quite consistent with probability, and is further proved by direct evidence.

There is no denial that the prisoner attempted to use the bond as genuine evidence. The question is whether the bond is false, and whether the prisoner knew that it was false when he produced it in Court.

There is great weight in the argument used by the prisoner's pleaders. The amount of the claim was not large. The prisoner is not a poor man, that it would be any great object with him to obtain the money he demanded. The first glance or examination of the document would prove that the bond was not written at the date alleged in it. The forgery was, in fact, discovered the moment the bond was filed. The defendant Bhoyrub Sircar was contesting the claim, and the prisoner must have known that the bond would be subjected to scrutiny. It is, therefore, difficult to believe that he, with a full knowledge of this clear forgery, filed the document, in the expectation that it would be admitted as genuine. The prisoner, when shown the receipt put in by Bhoyrub Sircar, did not deny that that was a genuine receipt. Had he wished to resort to forgery and perjury, such a denial would have been the easiest and most direct mode of doing so. He admitted that receipt, but asserted that it had been given for another

Gap No. bond, and, within four days, he filed that bond. There was no great delay, and if in the meanwhile he fabricated a bond on some other paper with the connivance of Madaree, it is difficult to imagine that he would have gone so carelessly to work as to produce a document which would be at once detected to be false.

But the prisoner's guilt depends principally on the question whether the sum alleged to have been lent to Madaree by the prisoner on the 5th Aughran 1267 had really been lent. The money is said to have been borrowed by Madaree in his capacity as Naib of a certain zemindary, not for personal requirements, but in order to pay in the revenue of the estate in the collections of the rents of which estate he was short. Madaree deposes that he did receive the loan of the 5th Aughran, but his evidence is not worthy of implicit belief, because it is said that he is conniving with the prisoner, and is his relation. The witnesses to that loan and the execution of a bond for the loan were examined by the Moonsiff, and deposed that such a bond had been executed. The tehsildar, Torrikollah Biswas, also before the Moonsiff admits that, in addition to the sum borrowed jointly by Madaree and Bhoyrub, another sum of money had been borrowed from the prisoner which was still unpaid. These witnesses were not examined by the Sessions Judge. The prisoner's khatta-books were not sent for and examined. It is also to be recollected that the receipt is addressed to Madaree Mundul alone, and not to him and Bhoyrub Sircar.

The conclusion which we arrive at on this evidence is that Madaree did borrow the money mentioned in this bond on the 5th Aughran 1267. If so, it is quite possible that the original bond was lost, and that the bond now put in is a second bond prepared by Madaree Mundul and either the prisoner or his gomashita to take the place of the original bond. This would not, however, be a false bond, inasmuch as it does not contain a false record of what actually took place. Madaree has denied that he executed this bond, but there seems very little doubt that it is in his handwriting.

The real dispute between the parties was as to which bond the alleged payments should be credited. Bhoyrub Sircar naturally expected that the earlier payments would be credited to the earlier bonds to which he was a party liable. Madaree Mundul, having been in the meanwhile dismissed

from his appointment as Naib, would be anxious to have them credited to the bond which he had executed singly. The prisoner would find his interests tally with the views of Madaree, because, as regards the debts from Madaree jointly with Bhoyrub, he would still have a hold on the zemindaree-amlah from whom the money was really due by executing his decree upon them against Bhoyrub; whereas, as regards the bond executed by Madaree singly, he might fairly anticipate some difficulty in realizing the money from Madaree's successor. It is to be recollected that all three bonds are for money borrowed, not on the personal account of Madaree and Bhoyrub, but to pay in the Government revenue of the estate in their charge, because the collections from the estate were short; and that the money was to be re-paid from the collections when they were made; the interest, also, to be recovered from the ryots who had not paid their rents in proper time. The Sessions Judge lays great stress on the fact that Bhoyrub held the receipt; but as this receipt would remain in the zemindary-cutcherry, even after Madaree was dismissed, Bhoyrub would have no difficulty in possessing himself of it.

Looking to all the evidence, we are not satisfied that the prisoner has committed any crime in using the bond as genuine evidence. We are not even satisfied that the bond is false. Though it must have been written after 1268, it may still, and we believe does, contain a true record of what took place in 1267. We, therefore, acquit the prisoner, and direct his release.

With regard to the objections of the Sessions Judge as to the authority of one Judge of the High Court to order the release of a prisoner on bail pending the hearing of an appeal, we are of opinion that Section 420 refers specially to Section 419 of the Code of Criminal Procedure; and that the temporary suspension of an order is neither a modification, amendment, nor reversal of an order; and that, consequently, one Judge was competent to issue the order which Mr. Justice Steer did.

The 12th April 1864.

Present :

The Hon'ble E. Jackson, *Judge.*

Rioting—Cattle-trespass.

The Queen Bokoo Sheikh and others.

Committed by Mr. F. H. Elphinstone, Deputy Magistrate of Meherpore, and tried by Mr. A. R. Thompson, Sessions Judge of Nuddea, on a charge of rioting, &c.

The prisoners having been part of an assembly of more than 5 persons, whose common object, as apparent from their acts, was, by means of criminal force, to recover possession of their cattle-seized for trespass (whether properly pounded or not), and who made use of such force, and took away their cattle, were held guilty of rioting, and liable to conviction under Section 147 of the Penal Code, and not under Section 11, Act V. of 1857.

THE charge against these prisoners was that they had gone in the middle of the night in a large body to rescue their cattle which had been seized for trespass, and had beaten the chowkeedar who had attempted to restrain them, and left him bleeding and senseless on the ground.

The trial was held with a Jury which found the facts proved, and the Judge, under Section 147 and Section 325 of the Penal Code, sentenced the prisoners to 2 years' imprisonment. The prisoners' appeal to this Court has been conducted by a pleader.

He urges, first, that the cattle were illegally detained in a place which was not a pound, and that no one was found in charge of them, and, therefore, the prisoners and their companions were at liberty to take possession of their own cattle.

I agree with the Judge that it was immaterial whether the cattle were properly pounded or not. They were in the possession of certain persons to whose charge they had been given on account of their trespassing, and those persons were public officers, *viz.*, a pound-keeper and a chowkeedar. The former ran off when the prisoners and their companions came up. The latter remained at his post, and received a severe beating, one of

the bones of his wrist being broken. The **Gap No.** prisoners carried off their cattle.

The acts of the prisoners come within the definition of rioting. They were part of an assembly of more than five persons, whose common object, as apparent from their acts, was by means of criminal force to the pound-keeper and chowkeedar, to obtain possession of their cattle, of which they had been deprived. They made use of such force, and took away their cattle.

The pleader then urges that the conviction ought to have been under Section 11, Act V. of 1857. Had the offence proved against the prisoners been only that of forcibly rescuing their cattle, I think there would have been some force in this objection. The special law would have superseded the Penal Code. But the prisoners are charged with a higher offence than merely forcibly rescuing their cattle. They are charged with committing riot, and the conviction and sentence under Section 147 of the Penal Code is, therefore, right.

The only remaining objection urged is, that there may be some doubt as to whether the bone in the chowkeedar's wrist was really broken, but this is a question of fact on which the Jury have decided.

I reject this appeal, seeing no ground for interference in the conviction or sentence.

The 12th April 1864.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Abetment of abduction of a woman—Wrongful confinement.

Miscellaneous Case.

The Queen versus Ishwar Chandra Jogee
and others.

Convicted by Mr. W. Clementson, Deputy Magistrate of Diamond Harbour, of

Dep No. *wrongfully confining a woman and of abetment of abduction, and sentenced separately for each of those offences, which conviction and sentence were upheld on appeal by Mr. F. L. Beaufort, Sessions Judge of the 24-Pergunnahs.*

The prisoners having been sentenced for abetment of abduction of a woman under Sections 109 and 498 of the Penal Code, and for wrongful confinement of her under Section 343—HELD that both sentences could not stand, and that, as the essence of the case was abduction, the prisoners, as abettors therein, should be punished for it alone.

Seton-Karr, J.—THE papers in this case were sent for by Mr. Justice Raikes, in order to see whether both sentences could stand in this case, viz., that for abetment of abduction under Sections 109 and 498, and that for wrongful confinement under Section 343.

After reading the decisions, and hearing the arguments of Counsel, I am of opinion that both sentences cannot stand. The abduction and the concealment and detention of the woman are both parts of the same offence, and should both be included under Section 498 of the Code. The judgments, on the face of them, do not show that there have been distinct offences requiring separate punishments.

But the learned Counsel asks the Court to strike out the conviction under Section 498, in which the appellants have been convicted as abettors of the act of abduction, and he urges that, where two convictions are recorded and one must fall, that in which the appellants are convicted as principals should stand, and that in which they are convicted as abettors should fall to the ground.

I do not think that the law or the justice of the case requires this. This is, as it were, a special criminal appeal on a dry point of law, in which it is only necessary for this Court to consider whether there is a legal conviction, and in which it is undesirable, for obvious reasons of public policy, to interfere with the amount of the sentences, except on pure legal grounds.

There is ample evidence which satisfied both Courts as to the conviction for abetment, and I would, therefore, confine the interference of this Court to a reduction of the period of six months' imprisonment given in excess for wrongful confinement.

The essence of the case is clearly the abduction, and for that, as abettors therein, the appellants deserve punishment.

Loch, J.—I agree with Mr. Justice Seton-Karr in thinking that the extra six months should be remitted. The rest of the sentence should stand against all the prisoners.

The 12th April 1864.

Present :

The Hon'ble G. Loch and E. Jackson,
Judges.

Forgery—Alteration of Collectorate chellaun.

The Queen *versus* Hurish Chunder Bose.

Convicted by Mr. C. H. Campbell, Sessions Judge of Jessore, on a charge of forgery.

A fraudulent alteration of a Collectorate chellaun is a forgery of a document described in Section 467 of the Penal Code.

Loch, J.—* * *

SECTION 467 (of the Penal Code) enacts, among other things, that whoever forges a document, which purports to give authority to receive or deliver any money, shall be punished, &c. Now, what is a chellaun such as is the subject of this case? A Collectorate chellaun is a well-known document, and, as its name imports, it is a memorandum of the amount of Government revenue, which the party holding or offering it then proposes to pay in, and it is an authority for him to pay, and the Government officer to receive such revenue. It is prepared either by the party sending the money, and is forwarded with it, or, as is more frequently the case, it is prepared by the party

who actually pays in the money under authority given him, and who is generally the mooktear or agent of the landholder. It recites the number and name of the estate, the name of the intended proprietor, the kist for which the revenue is due, and the sum then intended to be paid in, and it is signed by the party paying it in, either on his own account, or, if an agent, on the part of the owner who has remitted the money to him for that purpose. If it be contended that in itself it is not any authority to receive or deliver money, but is simply a document which, so long as it remains in the maker's hands, he may fashion as he pleases, add to or alter without committing an offence, still there can be no doubt that, when once it has left his hands, and been presented to the Collector, and compared in his office, and been marked and signed and registered by the Collector's officers appointed for that purpose, it becomes an authority to the party to pay, and to the treasurer to receive, the Government revenue from him; and if the party, after having presented that document, fraudulently alter any part, or make any new entry therein, thereby intending to commit fraud, he has, we think, committed a forgery of a document described in Section 467 of the Penal Code. If the chellaun were signed by the sender of the money, and the agent's duty consisted in merely paying in the money according to that chellaun, then clearly that chellaun would be an authority for him to pay money, and any fraudulent alteration of that chellaun would be a forgery of a document described under Section

The 28th April 1864.

Gap No.

Present:

The Hon'ble G. Loch and E. Jackson,
Judges.

Right of appeal (to prosecutor)—Dismissal of complaint.

Reference, under Section 434 of the Code of Criminal Procedure, made by Mr. Malet, the Sessions Judge of Beerbhoom.

Messrs. Lyall and Co. *versus* Sam Mundle.

In a case of dismissal of complaint by a Deputy Magistrate, it was held that a prosecutor had no right of appeal, but ought to have moved the Magistrate to procure, under Section 434 of the Code of Criminal Procedure, a reversal, by the High Court, of the order of dismissal.

Loch, J.—(ON the 23rd June, the Deputy Magistrate, after hearing the evidence of three witnesses in support of the prosecution taken in the presence of one of the defendants, held that the evidence was so discrepant as to be quite insufficient to sustain the charge, and therefore he acquitted the accused without taking his examination, and dismissed the case. The judgment of the Deputy Magistrate has reference to the character of the evidence generally as regarded its sufficiency to support the charge, and not merely as regarded the criminality of the party then before the Court. He found that the evidence was altogether insufficient to sustain the charge. This being the case, it is manifest that such evidence would not be sufficient against any of the parties accused, and, if the prosecutor were allowed to carry on the case, it would be necessary for him to bring forward fresh evidence. But, instead of doing this, he preferred a local investigation which was

Case No. made at his request, and the result of this enquiry being as unsatisfactory as the other, the case was again dismissed.

The question, however, is whether the prosecutor had any appeal in such a case. The Magistrate considers that he had; but I do not find that the Code of Procedure gives a prosecutor whose case has been dismissed any right of appeal. If the Lower Court have acted erroneously, the prosecutor may bring such error to the notice of the Magistrate, and the Magistrate may report the same for the orders of the High Court, but I do not think that a prosecutor has any right of appeal; and, if this be a correct view of the law, the Magistrate's order should be reversed.

Jackson, J.—I think the Magistrate's order must be reversed. The subordinate Magistrate has authority in a certain class of cases on certain Sections of the Procedure Code to dismiss a complaint. No appeal lies from any such order. The case before the Deputy Magistrate was of that description that he might have dismissed it, and he did dismiss it. He afterwards explained that he did not mean to dismiss it, but only to acquit the one accused who was under trial before him. Still the order he did pass, whatever he meant, was to dismiss the complaint. The Magistrate could not, after such an order, either hear an appeal from it, or re-open the case as a new case before himself, without first procuring the reversal of the order

passed by the Deputy Magistrate by the High Court on the ground of illegality.

This case shows how important it is that all officers, exercising magisterial powers, should, in passing orders, use the phraseology laid down in the Code.

The 29th April 1864.

Present :

The Hon'ble C. Steer and F. A. B. Glover,
Judges.

Murder—Drunkenness.

Committed by Mr. W. P. Reilly, Deputy Magistrate of Sewan, and tried by Mr. W. H. Brodhurst, Sessions Judge of Sarun, on a charge of murder.

The Queen *versus* Ram Sahoy Bhur and others.

In a case of murder committed in a drunken squabble, it was held that voluntary drunkenness, though it did not palliate any offence, might be taken into account as throwing light on the question of intention.

Glover, J.—THE Sessions Judge has convicted all these prisoners of "murder," and sentenced them to transportation for life.

It appears from the record that the prisoners Nos. 1, 2, 3, and 4, and the deceased, went one morning to a grog-shop, and spent the entire day drinking. At sunset, they set out in an intoxicated state to return home, and on the road fell to quarrelling. The evidence shows that Ram Sahoy, prisoner No. 1, and the deceased began the

squabble by first abusing, and afterwards striking each other with *lallees*; but the quarrel soon became general, and the deceased was attacked by all the prisoners and knocked down. He died the next morning, the cause of death (according to the native doctor) being rupture of the spleen.

Now, admitting all these facts, I do not think that the prisoner's crime amounts to murder. Voluntary drunkenness does not, of course, palliate any offence, but it is generally taken into account as throwing light on the question of intention, and it can hardly, I think, be contended that there was any "intention to kill" in the present case; nor do I consider that, where all parties to a fight are intoxicated, the question of undue advantage can arise. In this case there seems to have been a sudden and general squabble, and a "sudden fight," originated by Ram Sahoy and the deceased himself, in which eventually the other prisoners themselves, heated by drinking, took part.

I would convict the prisoners of culpable homicide not amounting to murder, and sentence them each to seven years' rigorous imprisonment.

Steer, J.—I quite agree with Mr. Justice Glover that the offence of the prisoners does not amount to murder, and the sentence of seven years which he proposes is quite an adequate measure of punishment for the nature of the offence established against the prisoners.

The 29th April 1864.

Gap No.

Present:

The Hon'ble G. Loch and C. Steer, *Judges*.

Cheating.

The Queen *versus* Raj Coomar Banerjee.
Tried by Mr. W. T. Tucker, Sessions Judge of Backergunge, on a charge of cheating.

To induce a son to pay his father's debts, by acting merely on his fear of consequences to his father, is not cheating. To describe those consequences to be more serious than, in fact, they were likely to be, may be to deceive, but is not cheating if done without any fraudulent or dishonest intention.

Loch, J.—I THINK this conviction cannot stand. The facts may be accepted; but, admitting them, I do not think the prisoner can be convicted of cheating. It appears that Aluk Chunder Banerjee, witness No. 1, had been employed as a *tahsildar* by Mr. Morrell on the recommendation of the prisoner Raj Coomar Banerjee. It is not shown that Raj Coomar became surety for him.

Aluk Chunder appears to have defaulted, and to have been laid hold of by Morrell; and his friend and relative Raj Coomar was probably also told to exert himself to

Or. 4.

Case No. recover what was due from the defaulter. For this purpose he visited Umbica Churn, the son of the defaulter, and pressed upon him the necessity of paying up, and, to rouse his filial zeal, probably added one or two dreadful suggestions of what might be done by Morrell, should the son fail to produce the money; and it was under this pressure, I think, that the money was obtained by the prisoner, not for himself, but to make good the amount of the defalcation. It was, perhaps, not the most legal method of realizing the money, and the prisoner probably stated the truth with exaggerations; but he had not, in my opinion, an intention of cheating the prosecutor out of his money. I would reverse the sentence, and release the prisoner.

Steer, J.—I think that there can be no reason to doubt the evidence for the prosecution which states that Aluk Chunder was in a state of restraint under, or by orders of, Mr. Morrell. Nor is there any reason to doubt that Mr. Morrell claimed to have money due to him from Aluk Chunder, and that he was detained pending the settlement of this matter.

While Aluk Chunder was detained at Surruleah, Raj Chunder, a relative of his, went, with or without Mr. Morrell's authority, to his son Umbica, to whom, representing the trouble his father was in, and probably exaggerating the likely consequences of it, induced Umbica to raise and to pay

him a sum nearly corresponding to his father's defalcations to Mr. Morrell.

The question is whether the money obtained under the above described circumstances can be said to have been obtained by means which the law designates under the term "cheating"?

To induce a son to pay his father's debts, by acting merely on his fear of consequences to his father, does not seem to me to come within the definition of the crime of cheating. If the father did embezzle any money from Mr. Morrell, his master, there is no doubt that the consequences to him might have been serious. To describe them to be more serious than, in fact, they were likely to be, may be to deceive; but if a fraudulent or dishonest design, which is an essential element of the crime of cheating, is not apparent in the person deceiving, he does not cheat. Raj Coomar, in prevailing on Umbica to pay his father's debt, may have acted with the best of motives. He may have argued that it is better to get the son to pay the debt, than that matters with the father be pushed to extremities, and he be put to jail.

He may have worked upon the fears of the son by purposely describing the consequences of non-payment as much greater than he knew them to be, but it was not with any fraudulent or dishonest intent, and therefore he did not cheat.

I agree that the offence is not made out, and the prisoner must be released.

The 2nd May 1864.

Present :

The Hon'ble G. Loch and F. A. Glover,
Judges.

**Murder—Section 380, Code of Criminal
Procedure—Sentence—Mitigation.**

Queen versus Dabee and others.

Section 380 of the Code of Criminal Procedure does not authorize a Sessions Judge to sentence a prisoner convicted of murder to anything less than transportation for life, but only requires the Judge, if he sentence such prisoner to transportation for life instead of capitally, to assign his reasons for so doing. If there are circumstances which render expedient or advisable a mitigation of the sentence required by the law to be passed in such cases, the Judge may record those circumstances, and submit them for the consideration of the Government, and the Government may, under Section 54, act as to it seems proper.

Loch, J.—THE order of the Deputy Commissioner in this case is contrary to law. The punishment for murder is, under Section 302 of the Penal Code, death or transportation for life. The Judge trying the case is bound to pass sentence either of death, which sentence requires the confirmation of the High Court before being carried out, or of transportation for life. If the Judge sentence the prisoner to the minor punishment, he must assign his reasons for so doing in the monthly statement submitted to the High Court, as prescribed by Section 380 of the Criminal Procedure Code. The meaning put upon that Section by the Deputy Commissioner is not correct. It does not authorize a Sessions Judge to sentence a prisoner convicted of murder to anything less than transportation for life; but if a prisoner be convicted of murder, and the Judge, instead of sentencing him capitally, sentence him to transportation for life, it requires the Judge to explain his reasons for so doing. If there are circumstances which render a mitigation of the sentence required by the law to be passed in such cases expedient or advisable, the Judge may record those circumstances, and submit them for the consideration of Government, and the Government, under the provisions of Section 54 of the Code of Criminal Procedure, may act as to it seems proper.

I would, under the provisions of Section 405 of the Code of Criminal Procedure, quash the sentence as illegal, and pass a sentence of transportation for life upon the prisoner, leaving the Judge or the prisoners to follow the course indicated above for a mitigation of the sentence.

Glover, J.—I concur with Mr. Justice Loch in quashing the Judge's sentence, and in passing one of transportation for life on all the prisoners.

The 2nd May 1864.

Present :

The Hon'ble G. Loch, C. Steer, and F. A.
Glover, *Judges.*

Dacoity—Receiving stolen property.

Criminal Appellate Jurisdiction.

Bhyrub Seal and Koobeer Chung,
Appellants.

A person convicted of and sentenced for dacoity cannot also be convicted of and sentenced for receiving or retaining the stolen property thereby acquired (Loch, J., dissenting).

Steer, J.—BHYRUB confessed the dacoity, and there is other very good circumstantial evidence against him.

There is also good evidence against Koobeer on the charge on which he has been convicted.

The Judge convicts Bhyrub of dacoity, and sentences him to 10 years' transportation; and he further convicts him of the offence of receiving stolen property, and sentences him to rigorous imprisonment for 3 years, which sentence is to have effect after the term of the transportation.

Koobeer has been convicted of the offence of receiving stolen property, and sentenced to 5 years' rigorous imprisonment. With the conviction and sentence of this prisoner, I would not interfere.

As regards Bhyrub, he has been wrongly convicted and sentenced on the second count, as the property with the guilty receipt of which he is charged was acquired by the dacoity, and the receipt was part of the offence of dacoity, and not a separate offence. I think, therefore, that the separate sentence for the charge of receiving stolen property should be struck out, and the sentence of 10 years' transportation only be allowed to stand.

Gap No.

7.—In this case there can, I think, be no doubt that the prisoner Bhyrub has been rightly convicted on two counts. The retaining the stolen property in this case is a distinct offence from the dacoity by which it was acquired. Some time elapsed after the dacoity, before the prisoner and his companions were apprehended with the bag of rupees. They appear to have concealed it at first on or near the spot where the dacoity occurred. They then took it in a boat to another place and buried it there, and it was while they were making off, after having marked the place of concealment with a bamboo, that they were captured. I would not interfere with this conviction or the sentence passed on Bhyrub.

Glover, J.—It appears to me that the wording of Section 412 of the Penal Code, under which the prisoner Bhyrub has been convicted on the second count, refers unmistakably to persons other than the actual dacoits, or what comes to the same thing, other than the persons proved to have been engaged in the dacoity; and that, where a prisoner can be convicted of the crime of dacoity, he cannot be punished in the same breath for knowingly receiving or retaining the property thereby acquired. The intention of the Legislature in adding a second count to all charges of theft, robbery, &c., was to prevent a criminal escaping when the evidence against him, as to the actual robbery or theft, was not clear enough for conviction; but it did not (as I understand it) contemplate punishing, *quoad* the same offence, the thief as the receiver also, when the parties were the same, as in the case of a dacoit carrying off and retaining his plunder. The one comprehends the other, unless under special circumstances. In this case the possession of the bag of rupees appears to have been continuous on the part of Bhyrub from the time of the dacoity until he was arrested almost immediately after concealing the money (for the second time) in the water, and I therefore concur with Mr Justice Steer that his retaining the property must be considered as part of, and comprehended in, the original crime by which he obtained it.

The 3rd May 1864.

Present:

The Hon'ble G. Loch and E. Jackson,

Land-disputes.

Criminal Jurisdiction.

Case referred under Section 434, Act XXV. of 1861, and Circular Order No. 187, dated the 15th July 1863.

Ramdyal and others

versus

Chinta Moonee and others.

Where there was a dispute as to the actual possession of land, not between two co-proprietors, but between rival ryots—HELD that, instead of attaching the whole estate under Section 319 of the Code of Criminal Procedure, the Magistrate ought to have settled the dispute as between the ryots.

Loch, J.—It appears to me that the Magistrate has unconsciously gone into the question of right, while he imagined himself to be keeping clear of it. The dispute appears to have arisen from the proprietor of one moiety of the estate giving leases to ryots to cultivate land without the consent of the proprietor of the other moiety, who, of course, would not acknowledge their right to hold the lands unless they attorned to him. As the property is held *ijmal*, the one proprietor had no legal authority to act in this manner without the consent of the other; but that was not the question before the Magistrate. The case appears to have arisen in this way. The cultivators stated that their occupancy was disturbed. The question for the Magistrate to determine was whether the complainants were or were not in occupancy. If they proved occupancy, that was a sufficient ground for the Magistrate keeping them in possession from whomsoever they borrowed their title. Section 318 of the Code of Criminal Procedure is as applicable to cases of this kind as to that of proprietors. The Magistrate, however, seems to have allowed the element of right to interfere. He saw that one proprietor had no right to act without the consent of the other, and he saw what might have occurred, the possibility of a breach of the peace if something were not done to settle the dispute, and he therefore made the proprietors parties to the case. As, however, the property was confessedly

ijmali, it was impossible to accept separate and independent possession except here and there, as for example, of a house or garden or orchard; and, of course, no satisfactory conclusion could be come to on the point of possession. Had he confined his attention to the case of the ryots, he would, though perhaps by a tedious process, have been enabled to determine the fact of their possession, and might have forbidden all interference with them till the disputes of the parties were disposed of in the Civil Court, at the same time leaving the proprietors the option of realizing their rents, which they might do for use and occupation, even when kubooleuts had not been given.

But I believe the proper course to be taken in such a case is that prescribed by Sections 26 and 27 of Regulation V. of 1812, modified by Regulation V. of 1827. It is the only method of meeting such a case as this, and the action of those Sections of the law is not confined, as the Magistrate seems to think, to disputes regarding appropriation of rents. The words are very large: "Inconvenience to the public and injury to private rights having been experienced in certain cases from disputes subsisting among the proprietors of joint undivided estates, whenever sufficient cause shall be shown by the Revenue Authorities or by any of the individuals holding an interest in such estate for the interposition of the Courts of Judicature, it shall be competent," &c., &c. The word used is "disputes," a large enough word—disputes productive either of inconvenience to the public, or injuries to private interests. In this case the latter will undoubtedly suffer. The proper course is for the Magistrate to apply to the Collector to move the Court, and with the sanction of the Judge to appoint a Manager. Where an estate is held "ijmali," and the proprietors are confessedly in possession, the provisions of Section 318 of the Code of Criminal Procedure are evidently inapplicable: and I think the Magistrate's order attaching the property should be set aside, and he be directed to proceed under Regulation V., 1812, as proposed by the Judge.

Jackson, J.—The question at present before this Court is, whether the order of the Magistrate, passed under Section 318 of the Criminal Procedure Code, is legal? The Magistrate states that he was satisfied that disputes likely to lead to a breach of the peace existed concerning certain lands in Mouzah Serampore. He recorded the grounds which led him to this belief, and he

called upon all parties concerned in the dispute to attend and give in written statements of their claim as respects the fact of actual possession of the land in dispute. But his subsequent proceedings seem to be erroneous. The real disputants, as regards the actual possession of the lands, were not the zemindars, but the ryots. The zemindars and their representatives for the time being were Mussamut Thorba, owner of 8-annas share, and Mr. Park, owner of 8-annas share, the shares being held undivided and ijmali. Mr. Park had in the previous year been farmer of the whole estate, and, as such, the ryots in possession had cultivated indigo for him. Mr. Park, at the time these disputes arose, was farmer only of an 8-annas share, and the ryots refused to cultivate indigo any longer. He consequently introduced other ryots from other villages, and gave them pottahs for his 8-annas share, and these ryots are said to have interfered with the land in the possession of the former ryots. At least the former ryots complained to that effect, while the new ryots asserted that the lands of which they had been granted pottahs were waste and previously uncultivated lands. The Magistrate should, on this case, have decided the dispute as between the old and the new ryots, and the determination of the question would have depended mostly on the fact whether the lands were those of the former ryots included in their jummas, and therefore in their possession, whether uncultivated or not, or whether they were waste lands not included in those jummas. In the former case, the old ryots should have been retained in possession. In the latter, the new ryots might be kept in possession.

But the Magistrate, instead of deciding the dispute as between the ryots, went into the question of the right of Mr. Park to give pottahs of 8 annas share of the land without the concurrence of the owner of the remaining 8-annas shareholder. He seems to have thought that a dispute as regards possession existed between the two shareholders, whereas the dispute between them was wholly as regards their rights, and was not in any way on the point of possession. Being unable to decide this question of right, he attached the whole estate under Section 319. Here, in my opinion, he was altogether wrong. Had he decided the dispute as between one of the old ryots and one of the new ryots, there would probably have been an end of all further contention; or if it continued, there would have been no difficul.

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Case No. ty in carrying on the decision to the cases of all the ryots.

The Magistrate might also, if he was satisfied that the provision of Regulation V. of 1812, Section 26, ought to be brought into force, have applied to the Collector to move the Judge to attach the estate. But this course appears to me to have been unnecessary in this case. The Magistrate had the power to settle the disputes between the ryots, but did not exercise those powers. The orders which he did pass are illegal. In concurrence with Mr. Justice Loch, I reverse those orders.

The Magistrate can either act under Section 318 of the Procedure Code as between the ryots, or move the Collector to apply to the Judge under Regulation V. of 1812, Section 26, as he may consider proper. But I do not see how the attachment of the rights of the proprietors can settle the disputes between the ryots.

The 3rd May 1864.

Present :

The Hon'ble G. Loch and E. Jackson,
Judges.

Dacoity with murder—Transportation—Imprisonment.

Criminal Referred Jurisdiction.

Queen *versus* Rughoo and others.

Convicted by the Judicial Commissioner of Chota Nagpore of murder and dacoity.

If a person concerned in a dacoity unintentionally commits murder, he is liable to punishment under Section 396 of the Penal Code, but he cannot be separately convicted of murder under Section 302, and of committing dacoity under Section 395.

Where the law gives the alternative punishments of death, transportation for life, and rigorous imprisonment extending to 10 years, a sentence of 14 years' transportation is illegal. If the Judge thinks it proper to pass a sentence of transportation short of life, he should pass a sentence of imprisonment for the term fixed by law, and then, under Section 50, change it to transportation for that period.

J.—THE reference in this case has been made to the Court with respect to the prisoner Rughoo No. 2, whom the Judicial Commissioner has sentenced capitally.

The prisoner Rughoo and eight others were concerned in robbing from the person, attended with severe hurt to two of the parties robbed, and death to the third.

There appears to have been some confusion in framing the charges against them. All the prisoners should have been charged under Section 396 of the Penal Code; whereas Guntoo, No. 1, and Rughoo, No. 2, were charged under Sections 302, 326, 395, and 397, while the other prisoners were charged under Sections 395 and 396.

The Judicial Commissioner very properly amended the charge against Guntoo and Rughoo, and brought them under Section 396.

The case is simply this. Three persons, Sobha, Seo Churn, and Hurry, were returning in the evening from the bazaar, where they had been to sell vegetable and other produce, when they were attacked on the banks of the Poomapani by a gang of 10 or 12 robbers, who, after beating them severely, robbed them of all the little property they had, and made off without having been identified. From the effects of this beating, Hurry is said to have died.

The police ascertained that the prisoners had been seen together about the time of the robbery, and apprehended Guntoo, Hurkoot, and Hugroo, who confessed, delivered up their share of the plundered property consisting of money and clothes, and implicated the other prisoners, who, when apprehended, also confessed and produced property. The prisoners repeated their confessions to the Magistrate, and these confessions are now used as evidence against them.

The Judicial Commissioner, in concurrence with the assessors, convicts the prisoner Rughoo on counts 1 and 3, *viz.*, wilful murder under Section 302, and committing dacoity under Section 395. He convicts him on the former count, because Rughoo, in his confession, admits that he struck the deceased. In this case, however, there was no intention to commit murder. It may be said that the offence comes under Clause 3, Section 300 of the Penal Code; but we have no evidence as to the real nature of the wounds. The Civil Surgeon, after describing the wounds, says that the deceased was suffering from erysipelas of the head and face, which had, no doubt, arisen from the injuries he had received; but we are not clearly informed whether the wounds were of such a character that, in the absence of disease, they would, in the ordinary course of nature, have proved fatal. We think the prisoner should have been convicted under Section 396, and we convict him accordingly; but not consider-

ing that this is a case which calls for the extreme punishment of the law, we sentence him to be transported for life.

From the report of the Judicial Commissioner before us, it appears that, of the other prisoners, he has sentenced three to transportation for life, and five to transportation for 14 years.

The Court point out to the Judicial Commissioner that the law gives the alternative punishments, *vis.*, death or transportation for life or rigorous imprisonment which may extend to 10 years. Should the Judicial Commissioner think it proper to sentence the prisoners to transportation for a period short of life, he should sentence them to imprisonment for the term fixed by the law for the particular offence, and should then, under the provisions of Section 59, direct that the prisoners be transported for that period. The sentence of 14 years' transportation is illegal, and the Court, accordingly, reduce it to 10 years.

The 11th May 1864.

Present :

The Hon'ble E. Jackson, *Judge*.

Theft in a building—House-breaking by night with intent to commit theft.

Queen versus Tincourec.

Convicted by the Sessions Judge of Dacca of theft in a building.

A person may be convicted of theft in a building and of house-breaking by night with intent to commit theft, though, if the Judge considers the punishment for the first sufficient, he need not award any additional sentence for the second.

THE prisoner was committed to the Sessions charged with two offences: *first*, theft in a building under Section 380 of the Penal Code; and, *secondly*, house-breaking by night with intent to commit theft under Section 457 of the Penal Code. The Sessions Judge and the assessors have found the prisoner guilty of the first, which is the lesser offence; but no opinion is recorded as to his guilt on the second offence, which is far the more serious of the two. The Judge should have recorded a finding and judgment on the second offence charged as well as on the first; though, if he considered seven years' transportation a sufficient sentence, he need not have awarded any additional sentence on the second charge.

The prisoner's guilt on both charges is quite clear on the evidence, and his appeal is rejected.

The 12th May 1864.

Present :

The Hon'ble W. S. Seton-Karr and F. A. Glover, *Judges*.

Murder—Grievous hurt.

Queen versus Mahomed Hossein.

Convicted by the Sessions Judge of Backergunge of murder.

In order to convict a person of murder arising out of grievous hurt, it is indispensable that the death should be clearly and directly connected with the act of violence.

Glover, J.—I do not think that this conviction can stand. That the prisoner wounded the deceased Omed Allee with a *dao*, is satisfactorily proved; but there is nothing beyond conjecture to show that death resulted from the injuries then caused. The wound was inflicted in September, whereas the deceased did not die till the following February—two months and a half or thereabouts after; and in the meantime he absconded from the hospital, where he was undergoing medical treatment, and made his way home.

I admit that his having so refused medical treatment would not alter the culpability of the party wounding him if death could be clearly traced to the injury inflicted, but there is no proof that it was so. The Civil Assistant Surgeon states that the wound was the probable cause of death; but as the body was much decomposed when he examined it, he could not state of what positive disease the deceased died; whilst the fact of so long a time having elapsed between the wounding and the death, and that the deceased was so far from being enfeebled by his injuries as to be able to abscond from the hospital, would seem to point to some other intervening cause.

In a case like this, it is indispensable that the death should be clearly connected with the act of violence, "not merely by a chain of causes and effects, but by such direct influence as is calculated to produce the effect without the intervention of any considerable change of circumstances."

I am not satisfied, therefore, that the deceased's death was the direct result of the blow inflicted on him by the prisoner, and I would annul the conviction of murder, sentencing the prisoner on the third count for "voluntarily causing grievous hurt," &c., to seven years' rigorous imprisonment.

Seton-Karr, J.—The petition of appeal is, to a certain extent, correct in stating that the Judge's decision should begin by stating the case for the prosecution and as against

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Gap No. the prisoner, before stating what the prisoner's defence was, or how it had failed.

Nevertheless, on looking at the evidence, I consider it fully proved that the prisoner wounded the deceased severely, after the prisoner had gone to the house of a widow, under circumstances which raise a suspicion that he went there for an improper purpose, and was, no doubt, when he found the house surrounded, ready for mischief.

I concur with Mr. Justice Glover in thinking that the conviction should be for grievous hurt, as the death is not shown to be so directly owing to the wounds as it ought to be shown.

The sentence should, therefore, be reduced to seven years' rigorous imprisonment.

The 19th May 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, Judges.

Witnesses (Examination of).

*Convicted by the Sessions Judge of Buckle-
gunge of voluntarily giving false evidence,
with intent to procure a conviction of an
offence.*

Queen versus Charroo and another.

A Sessions Judge must form his opinion on the evidence taken before him, and cannot act on depositions recorded before his predecessor. If the Judge who recorded some of the depositions of the witnesses on a Sessions trial is obliged to leave the district before he can conclude the trial, his successor must re-commence the trial *de novo*.

u. J.—I FIND that the Sessions Judge who convicted the prisoners, and passed sentence upon them, did not hear the evidence of the greater portion of the witnesses. The trial was commenced by Mr. Buckle as Sessions Judge on the 28th December. He examined nearly all the witnesses for the prosecution. But important witnesses were absent, and he deferred the trial for their attendance. In the meanwhile he left the district, and Mr. Tucker, the new Sessions Judge, recorded the evidence of the remaining witnesses on the 13th January, and convicted the prisoners.

I am of opinion that such a trial is informal and illegal, and that the conviction must be quashed and a fresh legal trial held.

There is no direct rule laid down in the Code of Criminal Procedure for such a contingency as here occurred. But there can be no doubt that the Sessions Judge must form his opinion on the evidence taken before him, and cannot act on depositions recorded before his predecessor. If the Judge who recorded some of the depositions of the witnesses on a Sessions trial is obliged to leave the district before he can conclude the trial, his successor must recommence the trial *de novo*.

I would also add that I have considered the evidence as recorded against the prisoners, and am far from satisfied that the prisoner's guilt is sufficiently proved. I remark that many of the witnesses who depose to Charroo's presence at the execution of the disputed deed of sale admit that they had never seen him previous to that date. I should hesitate very much to accept their evidence as good against him. I also remark that no enquiry has been made as regards the delivery of the title-deeds, namely, the dakhilas, upon which there is direct issue joined between the purchaser and the prisoner Charroo, the former asserting that he received them, and the latter that he still holds them. The question as to whether possession was given under the deed is also important in ascertaining the genuineness of the document. It is stated that Ashgur, one of Charroo's co-sharers, had previously dispossessed Charroo of his share. This point has not been looked to.

Looking solely to the evidence recorded, I would acquit the prisoner; but if another Judge is of opinion that a fresh trial should be held, orders can be passed to that effect.

Seton-Karr, J.—On the whole, I am of opinion that there ought to be a new trial before the present Judge. There is ample evidence to go to a jury or to assessors, and, as my colleague justly remarks, several rather material points have not been enquired into.

I do not see why Mr. Buckle left the district without finishing this trial. The delay between the 28th of December and the 13th January was not great, and he might very well have waited for the additional evidence which he had sent for.

The proceedings should be quashed, and a new trial be held *de novo*. If the Judge convicts, he will, of course, consider the period of imprisonment already undergone.

The 3rd June 1864.

The Hon'ble E. Jackson and F. A. Glover,
Judges.

Summons (Issue of).

Miscellaneous Case.

Huronath Roy, *Petitioner.*

A complainant's deposition must show some grounds for proceeding before a Magistrate can legally issue a summons.

Jackson, J.—THE question raised before us on this application is as to the legality of the issue of a summons on the applicant Huronath Roy by the Joint Magistrate of the 24-Pergunnahs. The application was at first made before Mr. Justice Loch, who, under Section 434 of the Procedure Code, sent for the papers; and we are now asked, under Section 404 of the Code, to declare the issue of the summons on the applicant illegal.

We think that the Joint Magistrate had no sufficient ground for proceeding against Huronath Roy on the written complaint preferred by Baboo Prannath Roy Chowdhry, or on the examination of his mooktear Faqueer Chand. Looking at that complaint as one then and there instituted by Baboo Prannath Roy Chowdhry for the first time, and the greater portion of it was certainly then for the first time preferred, though a portion of it may have already formed the subject of enquiry before the Joint Magistrate, it was necessary under the law, Sec-

tion 66 of the Procedure Code, that the complainant shall be examined upon solemn affirmation to the facts of that complaint. The Baboo, it may be because he could not speak to the facts of the complaint in person, appointed a mooktear to act for him. His examination was taken; but it does not appear from that examination that he is acquainted with any of the facts on which the charge is based. He deposed to nothing which was within his own knowledge; and there is not in his application any ground of proceeding whatever against the petitioner Huronath Roy. The issue of summons against him is consequently illegal. This Court would not, if there was the very slightest ground for proceeding, interfere with a Magistrate's order in issuing his summons; but the complainant's deposition must show some grounds. It is not sufficient that a complainant deposes that he believes certain persons have committed theft or forgery, to enable a Magistrate to issue a summons against them. The complainant must show that he has some grounds for that belief. As a general rule, it remains with the Magistrate to decide whether the grounds for proceeding under Section 67 of the Code of Criminal Procedure are sufficient. In this case, however, we are clearly of opinion that there were not in the complainant's petition or his witness's deposition any grounds whatever for proceeding against Huronath Roy.

It is suggested by the Counsel for the complainant that the Joint Magistrate may have acted under Section 68 of the Procedure Code.

Case No. dure Code on the information which came to his knowledge from other enquiries which he had instituted under the direction of the Civil Court.

We think that, if the Magistrate had had ground for proceeding against Huronath Roy on those enquiries, he would have issued his summons in them. But he apparently could obtain no evidence and no ground for proceeding against Huronath Roy in that enquiry. He did not close those enquiries, and he appears to have passed no written order as to whether he should continue the enquiry or not. The record of that enquiry is distinct from the record of the complaint preferred by Baboo Prannath Roy Chowdhry. The summons was not issued in that enquiry, but on the separate complaint of Baboo Prannath Roy Chowdhry, which included several charges upon which the Magistrate had not been directed by the Civil Court to make any enquiry, but which were put forward for the first time in this complaint of Baboo Prannath Roy Chowdhry. We are from all these facts confirmed in our opinion that the summons, which it is now sought to have set aside as illegal, was issued under Section 67 of the Procedure Code on the complaint of Baboo Prannath Roy Chowdhry, and on the examination of his mooktear; and as that examination does not contain any ground whatever for proceeding against Huronath Roy, we are of opinion that the issue of such summons was illegal.

The day fixed for the attendance of Huronath Roy on the summons having passed by, it is sufficient that we should declare our opinion on the point. The Magistrate, before issuing any fresh summons on the parties charged by Baboo Prannath Roy Chowdhry, will examine him, or any person whom he may designate as acquainted with the facts, as to the grounds on which he prefers his charge, and will not issue summons unless, at least, some sufficient grounds are shown for proceeding.

We would add that even the order of the Civil Court contained no ground for proceeding against any particular person; but it was left to the Magistrate to make enquiries, and to act against any person against whom he should have grounds for proceeding.

Mr. Newmarch, at the close of the case, expressed an opinion that this decision would be a great hindrance to the arrest of offenders, and that a Magistrate ought to be able to issue a summons on a mere charge without making any previous enquiry.

But the law is imperative. The Magistrate must examine the complainant, in the same manner as if he were a witness, on solemn affirmation. He must, therefore, examine him on facts which are within his personal knowledge, and he can only issue a summons if there are sufficient grounds for proceeding. He may also act without any complaint, if he has knowledge of an offence having been committed; but that is not the case here.

Mr. Newmarch's client, Baboo Prannath Roy Chowdhry, would strongly object if the Magistrate of the 24-Pergunnahs, solely on the deposition of any person who chose to say that he believed Baboo Prannath Roy Chowdhry had committed theft or forgery, or any other disgraceful crime, without enquiring whether there was any ground for the charge, issued a summons against him, and forced him to leave his house and attend Court at a distance of two hundred miles. He would think it very unjust, and, under the law, such an order would be illegal.

The 6th June 1864.

Present:

The Hon'ble E. Jackson and F. A. Glover.

Section 59, Penal Code — Transportation in lieu of imprisonment.

Committed by Mr. F. Walker, Deputy Magistrate of Serajgunge, and tried by Mr. C. S. Belli, Sessions Judge of Rajshahye, on a charge of counterfeiting coin, and convicted of the abetment of the alteration of coin, and passing such altered coin as genuine, &c.

Queen versus Prem Chund Ousowal and others.

Under Section 59 of the Penal Code, a Court can sentence to transportation only in a case in which the offence is punishable with imprisonment for 7 years or upwards. It may, in passing sentence for the offence, commute the imprisonment to transportation; but it cannot commute the sentence after the sentence of imprisonment has been passed.

Jackson, J.—THE prisoners have been convicted of the offences of coining and passing gold mohurs. The evidence against them is very clear, and their own answer to the charges before both the Sessions Judge and the Magistrate show that the evidence is true.

But the sentences on prisoners Nos. 2 and 3 in this case are, as suggested by Mr. Justice Trevor in the monthly statement, illegal. The Judge has not authority to apply Section 59 of the Penal Code to the case of these prisoners. The offences of which they have been found guilty are for each offence punishable with smaller terms of imprisonment than seven years.

Section 59 says that, in every case in which an offender is punishable with imprisonment for a term of seven years or upwards, the Court, in sentencing such offender, may award transportation instead of imprisonment.

The words in the first clause of the sentence appear at first sight to bear out the Sessions Judge's view of the law. They allude to offenders, and not to offences, and an offender may be one who commits several offences. But the restriction in the first clause of the sentence is to be found in the concluding clause in the words "the Court which sentences such offender, instead of awarding imprisonment, may sentence to transportation." The Penal Code must be read with the Procedure Code. The latter Code in Chapter XXVI., Section 382, lays down that the Court must pass sentence for each offence separately. If this procedure is observed, the Court can sentence to transportation only in a case in which an offence is punishable with a term of seven years. It may, in passing sentence for the offence, commute the imprisonment to transportation. It cannot commute the sentence after a sentence of imprisonment has been passed,

Gap No. and it follows it cannot commute it at all except for offences for which the law awards seven years' imprisonment or upwards.

I would, therefore, alter the sentence on prisoners 2 and 3 to rigorous imprisonment.

I remark that the prisoners made certain statements by way of confession before the Deputy Magistrate, Mr. Walker; but the record contains no English memorandum of their statements, as it should have done.

Glover, J.—I concur with Mr. Justice Jackson.

The 9th June 1864.

Present:

The Hon'ble W. S. Seton-Karr and G. Campbell, *Judges.*

Murder.

Committed by Mr. J. Coombe, Officiating Magistrate of Monghyr, on a charge of culpable homicide, but tried and convicted by Mr. J. W. Dalrymple, Sessions Judge of Bhaugulpore, of the offence of murder, &c.

Queen versus Kewul Dosad.

A conviction for murder was held to be wrong in a case where a prisoner, taking advantage of an incident which occurred in what till then had been a fair fight, struck his opponent, and knocked him over.

Campbell, J.—I AM decidedly of opinion that the conviction for murder is wrong, and that the Magistrate was right in committing for culpable homicide only. I think it far too great a refinement on the part of the Judge to say that prisoner took undue advantage within the meaning of the law, because in the heat of the fight two other

persons ran up to assist prisoner. That would be applying an English Public School Code of Honor to such case in a way which I do not think that the Code contemplated. They did not get deceased down, and then deliberately beat out his brains. The fight was going on, both parties being armed with *lattes*, and probably prisoner was getting the worst of it when his cries for assistance brought reinforcements, and in the onslaught by the party thus reinforced prisoner hit deceased with his *lattee*, and knocked him over. I think that was clearly done without premeditation in a sudden fight in the heat of passion upon a sudden quarrel. Moreover, according to the Judge's finding, there were special circumstances of mitigation of prisoner's conduct, since he says that the deceased "drove his "buffaloes into the adjoining village of "Chuteeanee to graze. The prisoner Kewul, "who is chowkeedar of Chuteeanee and "also gorait, and whose special business, "therefore, it is to prevent the trespass of "cattle on the lands of his village, on seeing this, came forward." If the trespass be proved, there would be a right of private defence; but that right could not, in such a case, extend to the taking of life. I think that the case is one of culpable homicide with extenuating circumstances (the trespass being found by the Judge). I would reduce the offence to culpable homicide, and the sentence to two years' rigorous imprisonment.

Seton-Karr, J.—I concur with Mr. Justice Campbell. The prisoner should *not* have been found guilty of murder, for taking advantage of an incident which occurred in what till then had been a fair fight. I think that a sentence of two years' imprisonment is somewhat light for the offence of which the prisoner should have been found guilty; but, on the whole, I agree to the reduction.

The 2nd July 1864.

Present :

The Hon'ble G. Loch and L. S. Jackson,
Judges.

**Issue of summons—Examination of
complainant.**

*Reference, under Section 434 of the Code of
Criminal Procedure, by Mr. A. E. Russell,
Sessions Judge of Moorshedabad.*

Rujeeb Mundle *versus* Lochun Mundle
and others.

The Deputy Magistrate was held to have been wrong
in summoning the parties charged before examining
the complainant.

Loch, J.—THE Deputy Magistrate was
wrong in summoning the parties charged,
before the complainant had been examined
on oath or solemn affirmation. The Deputy
Magistrate might either have examined the
complainant himself, or, if he thought that
that was a duty to be performed by the
Magistrate receiving the complaint, he might
have returned the petition to that officer,
and requested him to do what the law
required of him. As the parties were
summoned illegally, but without any fault
on the part of the complainant, he should
not be made to suffer, and I concur with the
Sessions Judge in thinking that the fine
should be remitted.

The course to be followed in cases of this
kind has been laid down in para. 2 of the
Circular Order 6 of 1864, to which the
Judge will draw the attention of the Deputy
Magistrate for his future guidance.

Jackson, J.—It seems to me that the
Deputy Magistrate was quite wrong in this
matter.

Assuming that the officer called the **Gap No.**
"Joint Magistrate," not being Magistrate of
the District or in charge of a Division of a
District, is competent to refer cases to other
Magistrates having full powers (a point
which appears to me exceedingly doubtful),
he can refer a case in any stage, and the
Magistrate receiving the case is to be guided
(Section 275) by the rule prescribed for the
Magistrate of the District in similar cases.

The Deputy Magistrate, therefore, finding
a case referred to him, in which merely
the complaint had been preferred, but the
complainant had not been examined, should
have himself proceeded, in accordance with
the "rule prescribed for the guidance of
the Magistrate of the District," to take the
examination.

The Deputy Magistrate says that, in his
opinion, this function belongs, under the
wording of Section 66, to the Magistrate
before whom the complaint is preferred, and
to no other Magistrate; but, if this be true,
so also does the function of issuing the
summons under Section 67. But the Deputy
Magistrate in this case issued the summons.
If he could do the one act, he could also do
the other.

I think, therefore, that the Deputy Magis-
trate misconceived his duty in supposing that
it was not his business to examine the
complainant; but if it had been otherwise,
and if the Deputy Magistrate observed that a
preliminary step required by law had been
omitted, and thought that he could not
himself supply the defect, it is plain that he
might, as suggested by the Sessions Judge,
have moved the Joint Magistrate to do
what he should have done in the first
instance.

In any case, the complainant ought not to
be made to pay the expenses of so large a
number of defendants, who apparently
would never have been summoned at all if

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of the law had been complied with.

The tone of Mr. Lingham's explanation is, in my opinion, -----, dogmatic, and shows less deference for the opinion of a superior Court than is becoming.

The 5th July 1864.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr,
Judges.

Whipping (only in lieu of other punishment).

Convicted by the Cantonment Joint Magistrate of Barrackpore of theft, and sentenced under Section 381 of the Penal Code to 6 months' rigorous imprisonment and to be whipped; referred to the High Court by the Sessions Judge of the 24 Pergunnahs at the instance of the Magistrate.

Queen versus Abdool Khidmutgar.

In the case of adults on a first conviction, or in the case of juvenile offenders whether for a first or any other offence, whipping can only be *in lieu* of any other punishment.

Seton-Karr, J.—Born whipping and imprisonment cannot be legal in this case. The whipping should have been in lieu of the imprisonment, or the imprisonment should have been the sole punishment.

It would seem that the sentence of whipping should be annulled, as some portion of the imprisonment has been already undergone. Otherwise, the offender being juvenile, it were desirable that the whipping should have been inflicted.

J.—As this appears to be a first conviction, it is evident that, by Section 2, Act VI. of 1864, the whipping must be *in lieu* of any other punishment prescribed by Section 381 of the Penal Code.

Juvenile offenders, whether for a first or any other offence, may be punished with whipping *in lieu* of any other punishment.

As the prisoner has been imprisoned some time, the whipping cannot now be inflicted, and that part of the sentence must be quashed.

The 11th July 1864.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr,
Judges.

Examination of witnesses.

Convicted by the Sessions Judge of Nuddea of voluntarily causing grievous hurt.

Queen versus Kanye Sheikh.

Whenever a prisoner is put upon his trial, he is entitled to have the witnesses examined *de novo* if they have previously given evidence on the trial of another prisoner in the same case; and it is not sufficient to require the witnesses to identify the prisoner, and to read over to them their former examination, and require them to attest it.

Loch, J.—This Court has ruled on several occasions that, whenever a prisoner is put upon his trial, he is entitled to have the witnesses examined *de novo* if they have previously given evidence on the trial of another prisoner in the same case, and that it is not sufficient to require the witnesses to identify the prisoner, and to read over to them their former examination, and require them to attest it. The Sessions Judge has, however, in this case merely read over their previous examination to the witnesses, allowing the prisoner to cross-examine them, and has required them to identify the prisoner, which they have done. Before the Code of Criminal Procedure came into force, such was the usual mode of conducting these supplementary trials; but as it has since been held to be illegal, the proceedings in this case must be quashed, and orders issued for a new trial under Section 405.

The 19th July 1864.

Present :

The Hon'ble G. Loch, W. S. Seton-Karr, and
E. Jackson, *Judges.*

House-breaking by night—Dacoity.

Queen *versus* Rewut Rajwar and another.

*Convicted by the Sessions Judge of Behar of
dacoity with murder.*

Five men armed were discovered committing an act of house-breaking by night. One of the party was engaged in cutting a hole through the wall, while the others stood on guard. When the alarm was given, the neighbours ran up, and one of the robbers cut down one of the villagers, and the robbers effected their escape, not, however, before two of them were identified, the prisoners in the case. HELD by the majority of the Court that the crime of which the prisoners were guilty was house-breaking by night, and not dacoity.

Jackson, J.—THE prisoners have been convicted of dacoity with murder, and sentenced to transportation for life. This crime is punishable with death ; and if dacoity is so rife in the district of Behar, and requires to be put down with a high hand, as the Judge says, the circumstances of this case would have justified such a sentence.

The Sessions Judge has not, in accordance with Section 380 of the Procedure Code, stated the grounds upon which he remitted the punishment of death. His attention is drawn to this Section.

The evidence in this case is to the effect that the prisoners and three others were engaged in the offence of house-breaking at night ; and, on being surprised and surrounded, they made use of their weapons, a ghorassa and a lohabunda, with such effect that they killed one man, and succeeded in escaping. All the persons present at the time of their discovery, and at the attempt to capture them, have deposed that they recognized the prisoners. If this evidence is true, it is ample for the conviction of the prisoners.

The Judge and the Assessors, who had the best opportunity of judging of its truth, believed it in preference to the evidence to the *alibi* which the prisoners urged in their defence. I will not interfere with their finding, as it is not shown that the witnesses had any reason for charging the prisoners falsely, and as it is shown that the witnesses deposed the next day at the thannah that they had recognized the prisoners, and as, under the circumstances of the case, there was room for recognition.

I doubt, however, whether the offence of which the prisoners have been held guilty, is that of dacoity with murder. To constitute dacoity, five or more persons must join and commit or attempt to commit a robbery (Section 391). To constitute robbery, there must be a causing or attempt to cause hurt or death in order to the committing of theft or in committing the theft (Section 390).

In this case the prisoners were committing the offence of house-breaking, probably with intent to commit theft afterwards. But they had not completed breaking into the house, and had not committed the theft, and it cannot be said that the violence was caused in order to the committing of the theft, or in committing the theft. It was used to enable the criminals to escape. If, then, the prisoners were not committing robbery, they were not committing dacoity. They were committing the offence of house-breaking by night, in order to the commission of theft (Section 457), having made preparation for causing hurt (Section 458), and they committed the offence of causing death whilst committing house-breaking (Section 460). I consider that these terms are wide enough to include the assault made by the prisoners when surprised in the act of house-breaking and seized. Under this last Section, the prisoners are punishable with transportation for life. I would confirm the sentence passed on the prisoners under this Section.

Gap No. The sentence passed on the prisoners is also good on the offence of murder under Section 304 of the Penal Code.

Seton-Karr, J.—I would allow this sentence to stand as it is, the more so as the provisions of Section 426 of the Code of Criminal Procedure expressly meet the difficulty raised by my colleague. No "error or defect" prejudicial to the appellants is shown to have occurred. They have not been sentenced to "any larger amount of punishment" for dacoity, of which my colleague thinks them not guilty, than they might be for grievous hurt, of which he thinks they "ought on the evidence to have been found guilty." And consequently under the Section and words quoted, the finding or sentence need not be "reversed or altered" on appeal or revision.

But I also think that there was enough, on the evidence of the acts done by the accused, to justify the Judge in convicting of dacoity. He may be supposed to have held that the appellants came to the spot armed and ready for any violence, and that the violence which they displayed was displayed in order to the committing of the abstraction of the property, or in actually committing such abstraction, and as a consequence of their original intention.

In either view of the case I hold the alteration proposed to be unnecessary. It is no reduction of the sentence passed.

Louch, J. Five men armed were discovered committing an act of house-breaking by night. One of the party was engaged in cutting a hole through the wall, while the others stood on guard. When the alarm was given, the neighbours ran up, and one of the robbers cut down one of the villagers with a ghorassa, and the robbers effected their escape, not however before two were identified. These two have been apprehended and brought to trial, and my colleagues consider the evidence of recognition in this case to be credible, and have accepted it.

The case comes before me on a law point. The prisoners were charged with dacoity and murder, and having been convicted of that offence, have been sentenced to transportation for life.

Mr. Justice Jackson thinks that the prisoners have been wrongly charged with dacoity: *first*, because there was not a sufficient number of persons engaged in the offence to constitute that crime; *secondly*, the crime was

not "robbery" as defined in the Code: but he thinks that they were committing the offence of house-breaking by night as defined in Section 457 after having made preparation for causing hurt (Section 458), and they committed the offence of causing grievous hurt whilst committing house-breaking (Section 459), and he would sentence them under that Section.

Mr. Justice Seton-Karr would let the sentence stand under Section 426.

I agree with Mr. Justice Jackson in thinking that the crime of which the prisoners are guilty is house-breaking by night and not dacoity, though as the evidence proves that five men were present, this number, if the offence depended merely on number, would be sufficient. Dacoity, however, is only robbery committed by more than a certain number of robbers, and the definition of robbery in Section 390, "theft is robbery," does not suit this case. It comes under the definition of house-breaking (Section 445), for the accused, when discovered, were engaged in making a passage into the house, which the owner of the house never intended to be made, and certainly was never likely to use, and then, when surprised, they attacked the villagers who had assembled, and after killing one of them made their escape. Section 460 applies to this case: "If at the time of the committing of house-breaking by night any person guilty of such offence shall cause death to any person, every person jointly concerned in such house-breaking by night shall be punished with transportation for life," &c.; and under this Section I would convict the prisoners, which the provisions of Section 426 enables the Court to do, though the prisoners have been tried and found guilty on a charge of dacoity and murder.

It would save the High Court considerable labor if the Sessions Judges would take the trouble to ascertain either before commencing or in the course of a trial that the charge against the prisoners is correctly drawn up with reference to the evidence for the prosecution.

RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

1

The 1st August 1864.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr,

Puisne Judges.

Insane Persons.

Queen versus Sheik Mustafa.

Committed by the Deputy Magistrate, Kendraparah, tried by the Sessions Judge of Cuttack, on a charge of murder.

Course to be pursued by Sessions Judges in the case of apparently insane persons charged with murder.

We have considered the case, and find the one main point for our determination is the sanity or insanity of the prisoner at the time of the offence. Both the assessors are of opinion he was not of sound mind when he cut down his wife and mother. There is evidence to show that he spoke like a person not of sound mind on the very day previous to the murder, and there is no evidence of the existence of any reasonable or probable cause for jealousy on the prisoner's part, by reason of any evil conduct on the part of his wife.

The prisoner in this state of things should have been placed under the care of the Civil Assistant Surgeon, who should have been directed carefully to watch his state of mind, with a view to discover whether the prisoner was subject to recurring fits of insanity or light-headedness. This defect of enquiry must now be remedied.

The prisoner must be put under the special care of the Civil Assistant Surgeon, who will notify to the Judge, after he has had the prisoner not less than thirty days under his charge, whether he has reason to believe that the prisoner is, or ever has been, subject to periodical fits of madness, and the Judge will then take the evidence of the Civil Surgeon on oath, and forward the same with his opinion to the High Court.

For the interval, no orders will be passed on the reference.

The 8th August 1864.

Present :

The Hon'ble G. Loch, W. S. Seton-Karr, and F. A. Glover, *Puisne Judges.*

Theft—Vexatious complaint—Amends—Fine—Investigation of withdrawn charge.

Reference under Section 434, Act XXV. of 1861.

Chidi Chowbee versus Bhowany and Jhaw.

Although Section 270 of the Code of Criminal Procedure forbids compensation to a person falsely and vexatiously charged with theft, yet the law does not prevent a Magistrate from fining an unjust accuser.

The truth or falsity of a withdrawn charge need not be investigated.

Mr. Justice Seton-Karr.—I have considered the case, and am of opinion that no valid grounds are shown for interference, or for the remission of the fine.

The object of the merchant's complaint to the Magistrate was clearly to get possession of the persons of the two peadabs, to which end he charged them, with absconding from his service, adding, however, that they had taken with them, at the time of their departure, some embroidered lace, which they had in their possession on his account.

When the case came on, the complainant withdrew the charge, after the defendants had been marched through the country some hundreds of miles; and the Joint Magistrate, thinking the charge frivolous, and considering the treatment of the defendants to be extremely harsh, fined the complainant, and awarded a portion of the fine to the defendants as compensation.

Looking to the nature of the charge laid, I do not see that there was anything illegal in this; and the remarks of the Sessions Judge, as to the failure to investigate the truth of the charge, are wholly inapplicable. It is clear from the statements of both parties when confronted, that the case required no further explanation or enquiry whatever. In making these observations, I do not lose sight of the late ruling of the Full Bench to the effect that fines cannot be awarded for frivolous charges of theft. But I do not read this charge as substantially one of theft at all.

The object of the complainant was to recover possession, not of any property, but of the persons of the defendants, and in this view he brought against them a harassing and vexatious charge of leaving his service. I would allow this fine to stand, and I think the Sessions Judge would have exercised a sound discretion had he left the matter alone.

Mr. Justice Loch.—The parties were charged with absconding from service, and dishonestly taking property belonging to the complainant. Dishonestly taking is the definition of theft (Section 378). The charge is therefore one of absconding and theft, and consequently, under the late ruling of the Court, compensation cannot be granted under

Or, 6.

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Vol. I. Section 270 of the Code of Criminal Procedure. It is a very hard case.

Mr. Justice Glover.—There can be no doubt, I think, that the charge was substantially one of theft, and that, therefore, in accordance with the ruling of this Court, No. 469, dated 20th June 1864, no amends can be awarded under Section 270 of the Criminal Procedure Code. But, although the law forbids compensation to the accused, it does not prevent the Magistrate from punishing an unjust accuser; and I agree with Mr. Justice Seton-Karr so far that the fine inflicted on Chidi Chowbee should stand. The Sessions Judge, who referred the case, objects to the entire order of the Joint Magistrate, on the ground that the truth or falsity of the charge of theft was not investigated.

I think that, under the circumstances, no such investigation was required. The accuser himself withdrew the charge, and it is evident from his own explanations that he never had any intention or expectation of supporting it, but used it as a means of getting the run-a-ways again into his power. His statement to the Joint Magistrate is an unrivalled specimen of cool effrontery, and so far as preferring a false charge of "dishonestly taking property" against Bhowany and his fellow goes, I hold him self-convicted, and punishable under Section 211 of the Penal Code.

The 8th August 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover.

Puisne :

Jury — Native Christians — Theft — Criminal Breach of trust—Mode of directing a Jury.

from an order passed by the Sessions Judge of Dacca, dated 5th May 1864.

Bharut Chunder Christian, Appellant.

A Judge is not bound to try a Native Christian with the aid of a Christian Jury.

The subsequent making away with property by a person originally in lawful possession of the same is not theft, but criminal breach of trust.

A Judge, in directing a Jury, should confine himself to a general commentary on the evidence and a statement of offence proved, should such evidence be credited. He should not give a positive opinion as to the guilt or innocence of the accused person.

The appellant in this case has been convicted by the Jury of theft, and sentenced by the Judge to seven years' transportation. He is, it appears, a Native Christian employed

in the Dacca Police, and was sent in his official capacity to take charge of certain "lawaris," property appertaining to the estate of a deceased prostitute. He brought the same to the thannah, where they were locked up in a box, of which prisoner retained the key. There was a difficulty about making over charge of the property to the Head Constable on account of a silver chain which, although it was in the prisoner's list, was not to be found amongst the articles brought. Owing to this delay, the property remained in the prisoner's custody till the Deputy Inspector came to take charge of it when the whole was found to be missing. It is needless to go further into the case than to state that the entire property, *minus* the aforesaid silver chain, was eventually found in a deserted homestead close to the prisoner's mother's house buried underground.

It is urged in appeal before us (1) that the prisoner, being a Christian, should have been tried by a Christian Jury, and that he petitioned the Judge to that effect, but unsuccessfully; (2) that the Judge misdirected the Jury; and (3) that in any case the punishment inflicted was too severe.

We can find nothing in the law that makes it incumbent on a Judge to try a Native Christian with the aid of a Jury composed of his co-religionists. Section 325 of the Criminal Procedure Code gives no such privilege: the only right it concedes is that one-half of the Jury shall not consist either of Europeans or Americans. But although a Native Christian cannot legally claim the privilege of being tried by Christians, he has always under Section 343 the power of objecting to the Jury individually. In the present case, as appears from the reply of the Sessions Judge to a reference made by order of this Court, the prisoner neither applied to be tried by a Jury of Christians, nor did he object to any of the Jurymen, although questioned particularly on the subject. So far then we reject the appellant's petition.

But it appears to us that he has a good ground of objection on the second point. It is quite clear from the record that the offence of which the prisoner was convicted was not legally theft, inasmuch as there was not originally a wrongful taking or moving as in theft. The prisoner was sent to take possession of the property by superior authority: he was therefore, in the first instance, in lawful possession of the same, and his subsequent making away with it could only have been a criminal breach of trust, which consists in a wrongful appro-

priation of property consequent upon a possession which is lawful.

The Judge, therefore, in directing the Jury that, if they believed the evidence, the prisoner was guilty of theft, was wrong; and we have no option but to quash his conviction on account of misdirection, and to direct a new trial. The charge should have been put to the Jury in an alternative form, and then all this delay would have been avoided.

We must also remark that it is not desirable Sessions Judges should give their opinions as to the guilt or innocence of a prisoner so unmistakably as has been done in the present instance. Native Juries are too apt to take what they think to be the Judge's opinion as their guide without paying any attention to the facts of a case, and we conceive that the Judge should go no further than a general commentary on the evidence, and a statement of what is the legal offence proved, should such evidence be credited.

The 9th August 1864.

Present:

The Hon'ble G. Campbell and F. A. Glover,
Puisne Judges.

**Murder by Poison—Investigations by
Police and Magistrates.**

*Appeal from an order passed by the Sessions
Judge of Shahabad, dated 3rd June 1864.
Chutto Chamar, Appellant.*

Murder by poison. A man and a dog die a few hours after eating the same food, but no traces of poison are found in their bodies, or in the possession of the accused. The mode of investigation by the Police and by the Magistrates in such cases fully laid down.

Mr. Justice Campbell.—This is a very difficult and delicate case of murder by poison. The evidence is extremely meagre and badly got up, and the whole case is very little creditable to the administration of justice in Shahabad. It seems to have occurred in the Head Quarter Police Division of the district; and being a more important and difficult case than usually occurs during many months, I am quite unable to understand why the Police should have turned it over to an understrapper (a Head Constable), and the Magistrate left it to an Officiating Joint Magistrate. But so it was, and justice suffers.

As regards the Police investigation, it is enough to say that they did absolutely nothing in the matter. The Head Constable brought in the man arrested by the chowkeydar. The highly-paid Police officers do not appear in the scene, and there is no trace of any effectual Police enquiry whatever.

As regards the enquiry before the Magistrate, besides a most important (and, I think, in the present state of the case, fatal) omission, to be noticed hereafter, I observe that the Medical Officer of the station was not asked a single question as to the appearance of the bodies of the man and the dog, as to the state of their stomachs, as to the presence or absence of disease or natural cause of death; nor was he sent to the Sessions. Again, both the principal witness and the Police officer say that the cloth (said to have contained the poison) picked up by the witness, and given to the officer, had some white powder adhering to it. If the story of the witness is true, it seems hardly possible but that this must have afforded strong evidence; yet, instead of being carefully preserved, we find at the end of the proceedings that the powder had got shaken off, and the cloth was not sent for chemical examination. Further, connecting the boy Narain's cross-examination by the Officiating Joint Magistrate (who, no doubt, seems to have wished to do his duty) with that witness's evidence before the Judge, it seems to me clear that this witness never intended to assert that he saw the powder and cloth, but merely repeated in the usual loose native way what he had heard from the other witness and inferred, and that, if he had been properly examined by an officer of sufficient experience, the Magistrate would have been saved the great blunder of asserting in the calendar that this boy "had seen the prisoner take a rag from his dhootee, and mix something therefrom with the suttoo, and throw the rag away," the whole of which statement is totally opposed to the fact. An experienced Magistrate and a tolerable Police officer would have devoted their most particular attention to the circumstances connected with the death of the dog.

As the case stands, supposing it to be established that the deceased died from the effects of poison, the evidence fixing the crime on the prisoner rests on the testimony of Mussamut Soondree alone. Her evidence is open to the observation that she was in the first instance taxed with causing the death. But it seems certain that she had no possible motive for such an act, and that there is much to clear her. There is also no sufficient motive to induce her to accuse the prisoner falsely. Her evidence is intelligent and positive, and I think that, if it is to be fully believed, it may, under all the circumstances, be considered to establish a sufficient presumption against the accused. Upon the whole, then, allowing for the neg-

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lect in the case, I might consider that the evidence against the prisoner would suffice if the death by poison be established. But how is that established? There is not a trace of evidence of poison either in the possession of the prisoner, or in the body of man or dog. The death of the man by poison is solely established by the supposed simultaneous death of the dog, and by that alone. The death of the dog is the *crucial* matter in the whole case. And it is neither investigated, nor decently proved. I can find nothing to show who produced the dead dog, or anything else of his story. The whole of that part of the story seems to have been almost assumed. The prisoner does not admit it; on the contrary, he distinctly traverses it, and asserts that the dog sent in died some time before, and was taken out of a hole. He also says that deceased died of cholera, and that his body had been taken to the burning ghat before the accusation was made, and it was brought back. Before the Judge two witnesses, the widow and the boy, say barely, the rest of the suttoo was thrown to a dog, and afterwards the dog died. Not a word more. No cross-examination. Nothing to show whether they state this of their own knowledge, or whether (like the other part of the boy's story) it is hearsay whose the dog was, where it was sick, where it died, who identified it, who brought its body, whether the circumstances were such as to show conclusively that the death of the dog was the direct consequence of eating the suttoo. There must be a proper enquiry into all this. It is wholly impossible to convict for murder on the evidence on the record, and the Medical Officer must state both whether in the man's body there was to be found any natural cause of death, and whether the stomach of man and dog exhibited those inflammatory symptoms which usually accompany death from irritant poison. I am aware that those symptoms are uncertain, and may also be caused by disease. But while the absence of poison in the viscera may be accounted for by the violent sickness described by the widow, we must make the most of any evidence forthcoming. If the Medical Officer neglected to examine the body and stomach (which from his letter to the Police officer may perhaps be the case), we must, at any rate, have that in evidence.

I would therefore remand the case to the Sessions Judge to take further evidence regarding the cause of death in respect of the two points: *viz.* the state of the body and stomach of the deceased when sent in; and,

and, the facts of the death of a particular dog duly identified consequent on eating the suttoo thrown to him by the deceased; the latter subject in particular to be investigated with such care as to exclude the possibility of a dead dog having been picked up, and assumed to be the dog that swallowed the poison and died.

After taking evidence on these points, the case should be re-submitted.

I also think that copy of this Minute should be sent to the Government of Bengal, with a view to enable Government to make use of its highly-paid officers for the investigation of important cases, which are thus liable to be turned over to subordinates.

Mr. Justice Glover.—I quite agree with Mr. Justice Campbell that it is impossible to convict the prisoner on the evidence recorded, and am willing to send the case back for further enquiry, but am not sanguine as to the result.

The investigation was loosely conducted from the first, and evidence then forthcoming is now lost. The points to which particular enquiry should have been directed were the appearance of the "rag" and the death of the dog.

The Police constable declares that, when he gave the rag to the Magistrate, it had on it certain traces of a white powder. These have since disappeared, and a most important piece of evidence with them. Had this rag been examined chemically, directly it was handed in by the Police, the missing link of the evidence might have been supplied. As the case stands, we cannot get beyond suspicion. A man and a dog die a few hours after eating the same food (we are not told whether the symptoms were the same), but no traces of poison are to be found in their bodies. The Chemical Examiner distinctly states that he found no trace of any poison, and specially none of arsenic, which, from the symptoms detailed in the evidence regarding the man, would seem to have been the agent employed. Had the white powdery substance, which the Constable says was on the rag when he found it, been analysed, everything might have been cleared up. It may be as well, however, even now, to ascertain whether this rag formed part of the prisoner's dhootee. If a comparison of the fragment with the original cloth shows that it did so, it would be a strong point against the prisoner's assertion that he never went to Koorea's house at all on the day the deceased died.

With regard to the dog, it must be shown by independent testimony that this parti-

cular do gate the suttoo, and that he died shortly after doing so.

With regard to Mr. Justice Campbell's concluding remarks, I do not see what end would be served by making a special reference to the Government of Bengal on the subject. This appears to have been a case of unusual and individual negligence on the part of the Police. As a rule, I have observed that the investigation of all important cases is conducted by the District Superintendent, or one of his assistants themselves, and that, unless under very special circumstances, no case of murder is ever made over for investigation to a Head Constable.

The 15th August 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Investigation and Commitments by Small Cause Court Judges in cases of offences committed before them—Section 173, Code of Criminal Procedure.

Resolution on a letter from the Sessions Judge of the 24-Pergunnahs, dated the 8th August 1864, No. 269, annexing a letter from the Joint Magistrate of Sealdah, dated the 4th idem.

A Small Cause Court Judge, if it is his intention to proceed under Section 173 of the Code of Criminal Procedure, should complete the investigation, and either commit or hold to bail the accused persons to take their trial before the Court of Session.

The Court direct that the Sessions Judge inform the Judge of the Small Cause Court at Sealdah that, if it is his intention to proceed under the provisions of Section 173 of the Code of Criminal Procedure (and that such is his intention, the Court gather from his letter), he must complete the investigation, and commit or hold to bail the accused persons to take their trial before the Court of Session. The Sessions Judge should send the parties, who, it appears, have been admitted to bail, to the Judge of the Small Cause Court.

The 15th August 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges :

Jurisdiction—Section 29, Act V. of 1861—Section 152, Code of Criminal Procedure.

Indrobeer Thaba, *Appellant.*

Appeal from an order passed by the Sessions Judge of Beerbhoom, dated the 26th July 1864.

A Magistrate only, and not a Sessions Judge, has power to try cases under Section 29, Act V. of 1861. Section 152 of the Code of Criminal Procedure does not apply to cases in which there has not been a continuous detention of 24 hours.

The prisoner in this case was a Head Constable of Police in charge of the Pharee of Poorunderpore. He has been convicted, under Section 154 of the Code of Criminal Procedure, of the offence of detaining an accused person, one Kirthee, charged with theft, in custody for more than four and twenty hours, and punished, under Section 29, Act V. of 1861, with two months' rigorous imprisonment.

He has appealed on various grounds, into which it is not necessary for us to enter, as we think that his conviction is bad in law, and must be set aside.

It appears to us bad in the first place for want of jurisdiction. Section 29 of Act V. of 1861, under which come cases like the present, provides for the punishment to which Police Officers shall be liable "on conviction before a Magistrate." A Sessions Judge has no power to try such cases, which should be disposed of by the Magistrate himself.

Secondly, Section 152 of the Criminal Procedure Code provides that the accused person must not be kept in custody more than twenty-four hours. But it appears from Kirthee's own statement, as recorded by the Sessions Judge, that that individual never was in continuous custody for that time. He came in the first instance to the pharee at 3 o'clock in the afternoon, and left it at noon the next day. He was allowed to go ostensibly, as he says, to get bail, but in reality to collect 50 Rupees wherewith to bribe the Police. Any how he went away a free agent, and was not a prisoner in the pharee till his return on the morning of the next day after, and he was sent into the Sudder Station by the evening. Now, the law cannot, we think, mean that the number of hours an accused person is detained at a thannah is to be added up irrespective of circumstances. There must be a continuous detention of twenty-four hours to bring the parties within the scope of Section 152; and as in this case there was no such detention, we hold that the law does not apply, and that the prisoner cannot be punished under it.

The Sessions Judge has apparently convicted the prisoner on his own confession, but this confession is perfectly compatible

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with the statement of Kirthee. No doubt, if all the intervening time is to be counted, the accused was under a sort of *quasi* surveillance for two days and-a-half, but he was evidently not in legal custody at any one time for twenty-four hours. For the greater part of the intervening time, he was entirely a free agent, and came and went as he chose. He might have made off altogether had he been so minded.

Under these circumstances, we think that the Sessions Judge's order was illegal, and we accordingly reverse it, and direct the prisoner's immediate release.

The 17th August 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Defamation—Amenda.

Resolution on a letter from the Sessions Judge of Beerbhoom, dated 1st August 1864, No. 204, submitting proceedings in the case of Assuruddee Khan versus Baloo Khan and Bhoobun Chowdry, and recommending that the sentence passed by the Deputy Magistrate be quashed.

Case of defamation in which the complainant admitted all the more serious charges on which he based his complaint. Conviction and sentence quashed, as the gist of the offence (*vis.*, that the charge was not made in good faith) was entirely lost sight of.

Compensation is not awardable in such cases.

It appears that the prisoner Baloo Khan, who is a peadah of the Beerbhoom Collectorate, brought charges against Assuruddee Khan, the Nazir of the Collectorate.

1st.—That he, Baloo Khan, was a peon, and that the Nazir had dismissed him without reason.

2d.—That the Nazir claimed half the peon's fees.

3rd.—That the Nazir demanded one pice as *dustoor* on each process.

4th.—That processes are served through dismissed peons and *omedwars* to whom the Nazir gives but little, and whose fees he appropriates.

5th.—That the Nazir acts as *mooktear* on the part of certain *zemindars*.

6th.—That when acting *Darogah* of Shah-kullipore, the Nazir behaved badly in a certain *dacoity* case.

7th.—That the Nazir does not know *Bengallee* or *Persian*, but can only sign his name.

8th.—That the Nazir keeps a *Hindoo* *peon*, and has appointed her brother to a

peonship, and has employed her nephew as *buxee*.

The Collector dismissed the case, and recommended the Nazir to prosecute Baloo Khan. The Nazir, acting upon this hint, prosecuted Baloo Khan for defamation; and Bhoobun Chowdry for abetting the offence of defamation. The only part taken by the latter is, that he drew up the petition which embodied the charges. The Deputy Magistrate charged Baloo Khan with making a false charge, and Bhoobun Chowdry with abetting that offence, and fined them each Rs. 25, in default of payment to one month's imprisonment. The fine to be made over to the Nazir as compensation.

The Judge is of opinion that this conviction is illegal, because—

1st.—The charges were not drawn up formally and according to the instructions of the High Court, contained in their Circular letter, 18th March 1863.

2nd.—The charge was "false accusation," the conviction is for "defamation."

3rd.—The proceedings of the Collector are not evidence, inasmuch they were not of a judicial character.

4th.—That no enquiry was made whether the charges were made in good faith or not.

5th.—That no enquiry was made into the fact whether the charges were false; the Nazir having admitted some of the most serious ones.

6th.—That no enquiry was made as to the intention to hurt the reputation of the Nazir.

We think that the proceedings of the Deputy Magistrate are illegal, and that the conviction and sentence must be quashed.

The charges were not drawn up according to law, and the Deputy Magistrate in his explanation admits that the conviction and the charge are different, and the one does not support the other.

The Deputy Magistrate was wrong in admitting the proceeding of the Collector as evidence against the prisoner. "It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made, nor is it defamation to make charges against a public servant, and the Nazir is a public servant in the discharge of his public functions in good faith." *Vide* Exceptions 1 and 2, Section 499 of the Indian Penal Code. The Nazir admits receiving a *dustoor* on each process, also the service of processes through dismissed peons and *omedwars* on a lower scale of fees, and appropriating the dif-

ference, also the 8th charge, in short, all the more serious charges. The other peons were not examined on oath; so the 2nd charge is still an open question. We therefore think that the gist of the offence, which is that the charge was not made in good faith, has been entirely lost sight of, and that the conviction is illegal.

We also observe that, under a recent ruling of this Court, compensation cannot be awarded in cases of this description.

The conviction and sentence must be quashed, and the fine returned to the prisoners.

The 17th August 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Rioting—Being members of an illegal assembly—Appeal.

*Reference under Section 434, Act XXV. of 1861,
and Circular Order, dated 15th July 1863,
No. 18.*

Meelan Khalifa.

versus

Dwarkanath Goopto and others.

There cannot be a conviction both of "rioting" and of "being members of an illegal assembly." The greater charge includes the less, and to punish under both Sections of the Penal Code would be cumulative and illegal. Were both original sentences legal, the appeal would lie to the Sessions Judge.

We think that the Deputy Magistrate was wrong in convicting the accused both of "rioting" and of "being members of an illegal assembly," inasmuch as the greater charge includes the less, and they could not be guilty of rioting without also being members of an illegal assembly. To punish them under both Sections of the Penal Code was therefore cumulative and illegal.

We accordingly quash so much of the Deputy Magistrate's order as sentences the defendant to fifteen days' simple imprisonment for being members of an illegal assembly.

Under these circumstances it is unnecessary for us to go further into the matter of the Sessions Judge's reference, the sentence of the Deputy Magistrate being reduced to one month's imprisonment only. But we may add that, supposing both original sentences to have been legal, an appeal would have lain to the Sessions Judge, both the sentences being on the same evidence, and the aggregate of punishment being beyond the limit to which the power of appealing is restricted.

The 18th August 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Section 328, Penal Code—Construction of the words "or other thing."

Appeal from an order passed by the Sessions Judge of Midnapore, dated 20th May 1864.

Jotee Ghorace, *Appellant.*

The words "or other thing" in Section 328 of the Penal Code must be referred to the preceding words, and be taken to mean "unwholesome or other thing," and not other thing simply.

Mr. Justice Glover.—I doubt whether this conviction can be sustained. That the prisoner gave the woman Srimuttee Hurree a certain substance, which he wished her to understand was a charm that would, by being administered to her husband and sister-in-law, facilitate the intrigue he desired to establish with her, there can, I think, be no question. But the words of the Section (328) under which (in connection with Section 511) the prisoner has been convicted are "poison or any stupefying or intoxicating or unwholesome drug or other thing, with intent, &c., &c." The words "or other thing" must, in my opinion, be referred to the preceding words, and be taken to mean "unwholesome or other thing," and not other thing simply, as the Sessions Judge would construe it, for otherwise we should be involved in endless inconsistencies, and the offering of a loaf of wholesome bread might become the foundation of a criminal prosecution.

In this case there is no evidence to show what the "thing" proposed to be administered was. The witnesses describe it as small pills of different colors—red, black, and yellow. But nothing of the kind was sent to the Chemical Examiner; he received apparently only some charcoal and leaves. The Sessions Judge himself, I observe, treats the actual "thing" offered as "some absurd charm from a Soonyasee;" and as there is nothing to show what the different colored substances were really composed of, and as it appears from the evidence that there was no desire or intention on the part of the prisoner to injure any one by them, I think he should have the benefit of the doubt.

The evidence goes no further, in my opinion, than to prove the prisoner guilty of an attempt to commit adultery. I would acquit him under Section 328 of the Penal Code, which is substantially the basis of the

Vol. I. charge; although being convicted of an attempt only, the sentence has been passed under Section 511.

As I differ from the Sessions Judge as to the scope and meaning of Section 328, the papers must be laid before Mr. Justice Kemp.

Mr. Justice Kemp.—I entirely concur in this judgment.

The 22nd August 1864.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Commitments (Cancellation of)—Circular Order No. 7.

Resolution on a letter from the Sessions Judge of the 24-Pergunnahs, submitting the record of the case in which Gokul Bandari has been committed for trial to the Court of Sessions for the murder of Moluk Chand, and recommending that the commitment be cancelled.

The Sessions Judge wished to cancel a commitment apparently on the ground of the evidence being insufficient. As the commitment was not illegal, he was ordered to try the case, Circular Order No. 7 having reference only to commitments altogether illegal.

The Judge remarks that, if the case came up for trial, he should deem it his duty to direct the Jury to acquit the prisoner, and that it would be a waste of time to record the evidence.

We have read the grounds upon which the Deputy Magistrate, Moulvie Abdool Lateef, has deemed it proper to commit this case. There is nothing illegal in this commitment; and without prejudging the case, which the Sessions Judge appears to have done, we can see nothing improbable in the circumstances detailed by the Deputy Magistrate. The case must be tried as committed. The Circular Order No. 7, of the 2nd June last, has reference to commitments which are altogether illegal, and not to cases of this description.

The 26th August 1864.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Local Nuisances—Issue and enforcement of injunction—Section 314, Code of Criminal Procedure.

Queen vs. Rajah Indoobhooshun Deb Roy, Petitioner.

Appeal against the proceedings of the Deputy Magistrate, Sub-division Magoora, Zillah Jessore, with regard to certain property belonging to him.

Section 314 of the Code of Criminal Procedure authorizes the Magistrate to take immediate measures to prevent imminent danger pending the enquiry of a Jury, but not where no Jury has been appointed, and after the danger has passed away.

The Deputy Magistrate of the Sub-division of Magoora, Zillah Jessore, called upon the Rajah of Nuldangah, in the first instance, to show cause within eight days why certain huts erected for prostitutes in a bazar recently established by the Rajah in the close vicinity of the station of Magoora should not be removed. The Deputy Magistrate directed the removal of the huts on the score that they were a public nuisance. Before the Rajah could show cause, a fire broke out, not in the new bazar, but in the lodging house of a quondam sheristadar. The Deputy Magistrate went to the spot, and observing that the spark from the fire fell in dangerous propinquity to certain Government buildings, directed the agent of the Rajah residing on the spot to remove the whole bazar in one day. The agent naturally demurring in the absence of his principal to carry out that order, the bazar was levelled to the ground with the assistance of the Police, the agent fined for disobedience of orders, and the Rajah forbidden by injunction to re-establish the bazar on the former site.

The Rajah appealed to the Sessions Judge, who refused to interfere on the score that there was no appeal to his Court.

The pleader for the Rajah contends, *first*, that the erection of huts for prostitutes in a public market is not a nuisance within the provisions of Section 308 of the Code of Criminal Procedure. *Second*, that if such be a nuisance, the Deputy Magistrate should have proceeded with reference to the rules laid down in Chapter XX. of the said Code.

As the second injunction of the Deputy Magistrate for the removal of the bazar superseded that which was issued with reference to the erection of the huts for prostitutes, and was based upon totally different grounds *viz.*, the danger to the public buildings from fire, owing to the vicinity of the bazar, it is unnecessary for the Court to decide whether the erection of huts for prostitutes in a bazar is a public nuisance or not.

On the second ground we think that the procedure of the Deputy Magistrate has been illegal. He permitted the erection of the bazar, and appears to have pointed out the proper site for roads and shops. A fire breaks

out *not in the bazar*, but in the lodging of an Amlah. It is not shown that the buildings of the bazar were pulled down to arrest the conflagration. They were destroyed after the fire had ceased, and before the Jury for which the Rajah had applied within the time given to him to show cause had been appointed. It is true that the Deputy Magistrate was competent, under the provisions of Section 314 of the Code of Criminal Procedure, to take immediate measures to prevent imminent danger, but such action could be taken only "pending the enquiry of the Jury." Now, in this case, the Deputy Magistrate had appointed no Jury, though asked to do so, and the measures taken by him were taken after the danger had passed away. If the bazar buildings, which, it appears, are situated more than two beegahs from any public building, are dangerous, the lodging-houses of the Amlah, from one of which the fire arose, are equally so.

The proceedings of the Deputy Magistrate have been hasty and irregular. His order must therefore be reversed; and he will be directed to proceed strictly according to the rules laid down in Chapter XX. of the Code of Criminal Procedure.

The 30th August 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover.
Puisne Judges.

Hurt—Grievous Hurt.

Queen versus Bishnooram Surma and Kaleeram Surma.

Committed by the Officiating Deputy Commissioner, Durrung, and tried by the Judicial Commissioner, Assam, on a charge of grievous hurt.

A disability for twenty days constitutes grievous hurt. A disability for a fortnight is punishable for voluntarily causing hurt.

We think that the conviction in this case, of voluntarily causing grievous hurt, is illegal.

On turning to the medical evidence we find that, although the prosecutor is reported to have been severely beaten, no injuries, such as legally amount to grievous hurt, were found on his person.

The Medical Officer further deposes that he "thinks that the prosecutor may have been disabled by the injuries from following his ordinary pursuits for a fortnight," but the law contemplates a disability for a space of twenty days.

The conviction is altered to voluntarily causing hurt, punishable under Section 323 of the Indian Penal Code. The sentence must also be modified in as far as the term in default of payment of the fines imposed is concerned in the case of the prisoner Bishtoo Surma. The fine will be 50 rupees, in default of payment three months' rigorous imprisonment. In the case of Kaleeram the fine will be 25 rupees, in default of payment three months' simple imprisonment.

The 9th September 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,

Puisne Judges.

Insane Persons.

Queen versus Noorkhan Chowdry (Lunatic).

Committed by the Assistant Magistrate in charge of the Sub-division of Madharceepore, and tried by the Sessions Judge of Backergunge.

When an accused person is found to be insane before the completion of his trial, the Judge should postpone the trial under Section 389, and report the case to the Lieutenant-Governor under Section 390 of the Code of Criminal Procedure, instead of trying the accused when he is incapable of making his defence, and acquitting him under Section 394, on the ground that he committed the offence charged when he was incapable of knowing that he was doing wrong, and consequently that he has committed no offence under Section 84 of the Penal Code.

This prisoner was committed to take his trial before the Sessions Judge of Backergunge by the Assistant Magistrate in charge of the Sub-division of Madharceepore in that district, on the following charges :—

1st.—Rioting, Section 147.

2nd.—Murder, Section 302.

3rd.—Culpable Homicide not amounting to Murder, Section 304.

Before the Assistant Magistrate his defence was—

"I know nothing about the case of the murder of Aoly. I have no witnesses. Plaintiff has suborned evidence."

* There was no plea of insanity; and the witnesses do not appear to have stated that the prisoner was insane, or *had been so at any time.*

Before the Sessions Judge the prisoner, who was assisted by a pleader, on being called upon to plead to the charges which were explained to him, pleaded "not guilty," and claimed to be tried.

The Sessions Judge took the evidence of three witnesses. They all identify the prisoner as having taken an active part in the riot with wounding.

The first witness says nothing as to the prisoner's insanity.

The second witness, Newazuddee, to a question put by the prisoner's vakeel, says :
"The prisoner has been a fool (*pagul*) for ten

or twelve years. He has no understanding (*booj-sooj-naï*). He remains silent (*mute*). Has known prisoner for twenty or twenty-five years."

The third witness, Deahoola, says:—"Noorkhan is an old man, and without understanding. He has been in this state for a long time."

The trial was postponed, and the Civil Surgeon called on to report on the state of prisoner's mind. The prisoner was sent to him for that purpose.

The Civil Surgeon, on the 26th May, reports :—"The prisoner is an insane, and has been so probably for a long time."

The Civil Surgeon was examined on the 31st May. He deposes : "I am of opinion prisoner is insane, and incapable of making a defence. It is quite possible that he may have been insane for a long time. I cannot say whether he was insane in April 1861 (when the crime occurred)."

The assessors acquit : no reasons given.

The Judge finds that, "from the evidence, it is clear that the prisoner was present at the riot, but the witnesses state that he has been mad for many years, and the evidence of the Civil Surgeon *confirms this*. I am of opinion that he committed the offences with which he is charged, but that he was then incapable of knowing that he was doing wrong. Therefore, under Section 84, Indian Penal Code, he has committed no offence, and is acquitted under Section 394 of Procedure Code."

The Judge directs that the prisoner be kept in safe custody, and the case be reported to the Lieutenant-Governor of Bengal for his orders.

The Lieutenant-Governor remarks that the Judge should have proceeded with the case under Section 389, Procedure Code, and not have tried and acquitted the prisoner, inasmuch as the Judge found the prisoner to be of unsound mind and incapable of making his defence. The Lieutenant-Governor cannot understand how a man could be tried who was incapable of making his defence. The proceedings appeared to the Lieutenant-Governor so irregular as to render it impossible for him to issue any order for the disposal of the prisoner. A reference was made to the High Court. The lunatic to be kept in safe custody pending the result of this reference.

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Mr. Justice Trevor, in the English Department, observes that the proceedings of the Judge were most irregular. Under Section 389, the Judge should have confined his attention to the mere fact of prisoner's unsoundness of mind at the time he was committed for trial; and if satisfied of that, he should have postponed the trial. The Judge has gone beyond this, and has tried the prisoner.

The case has been laid before us for final orders.

We are of opinion that the proceedings of the Judge are irregular. The prisoner was found to be insane before the trial was completed. The Judge should have postponed the trial under the provisions of Section 389, and have reported the case for the orders of the Lieutenant-Governor of Bengal under the provisions of Section 390 of the Code of Criminal Procedure. Instead of doing this, the Judge has decided that the prisoner committed the offences with which he is charged when he was incapable of making his defence. The proceedings of the Judge must be quashed, and he will be directed to proceed under the above-named Sections of the Code.

Copy of this resolution to be forwarded to the Judge and to the Lieutenant-Governor of Bengal.

The 9th September 1864

Present.

The Hon'ble F. B. Kemp and F. A. Glover,
 Puisne Judges.

Jurisdiction of Magistrates — Maintenance of Chowkeedar in possession of Chakeran land — Appeal (to Superintendent of Police) — Language of Order in Miscellaneous Cases — Enquiries into cases involving Civil Injuries.

Queen versus Zemindar of Colgong.

Committed by the Magistrate, and tried by the Sessions Judge of Beerbhoom, on a charge of resumption of chakeran land.

A Magistrate can maintain a chowkeedar in the possession of his chakeran land (i.e., land set apart for his subsistence by his zemindar). Any such order of the Magistrate is appealable to the Superintendent of Police.

In a Miscellaneous case (not a judicial proceeding), the Magistrate is not required to record his final order in English.

A Magistrate is not prohibited from enquiring into any case of apparent injustice and oppression brought before him, even where the injury complained of is of a civil nature, provided he stops his proceedings directly he ascertains the nature of the claim.

This was a reference from the Sessions Judge of Beerbhoom, recommending the cancellation of four different orders issued by the Magistrate of that district, in Miscellaneous cases, as illegal.

The first case (No. 626) is one in which the Magistrate first summoned, and afterwards ordered the arrest of a zemindar for not making up the proper *quantum* of "chakeran" land to a chowkeedar employed within his estate. The Sessions Judge holds that the Magistrate had no right to entertain such a complaint, and he objects to the practice of summoning zemindars on such charges.

Now, it is true that Circular Orders to Superintendent of Police, Lower Provinces, 14 of 1839, and 8 of 1841, forbid any Police interference, either with or without the orders of the Magistrate, with the payment of chowkeedar's wages. But a Magistrate is authorized to take up these cases, and to maintain chowkeedars in possession of lands set apart for their subsistence; and in this case we think that the Magistrate had the right to interfere and protect the chowkeedar in the enjoyment of the full quantity of land which his zemindar had stipulated to give him. We observe, moreover, that any such order passed by the Magistrate for maintaining a chowkeedar in possession of land set apart for his subsistence is appealable to the Superintendent of Police. We do not see how or why the Magistrate acted illegally in the present instance; and, though we think that the custom of summoning zemindars in such cases is objectionable, it does not appear to us illegal.

With regard to the Sessions Judge's remark that the provisions of Act XXXIII. of 1854 have been disregarded, we think that this was not a case that required the Magistrate to record his final order in English. It was a miscellaneous case simply, and in no sense a judicial proceeding.

These remarks apply equally to the second case referred (No. 570). We see nothing illegal in the Magistrate's proceedings.

With regard to case No. 607, we observe that all the Magistrate did was to send for the zemindar's *gomashta*, and direct him to appoint a chowkeedar. On being questioned by the Magistrate, the man stated that a chowkeedar had been appointed, on which he was forthwith discharged. The Sessions Judge holds that Magistrates are not competent to take measures of this kind. He states that, although Regulation XX. of 1817 requires zemindars to appoint chowkeedars, it provides no penalty for non-compliance.

Doubtless this is so. And the law has been laid down fully in the S. N. R., Vol. 4, p. 175. But we do not see how this argument affects the present case. There was no punishment inflicted on the gomasta; he was merely summoned to give his reasons why he had not appointed a chowkeedar, and the end of the matter was, that a man was appointed; no punishment was either threatened or inflicted.

In case No. 606 the Sessions Judge objects to the Magistrate's proceedings on the ground that the question between the parties was purely a civil one, and ought not to have been entertained in a Criminal Court. The complainant, it appears, was a newly-appointed chowkeedar, who, on going to take possession of his land, found the defendant in possession under an agreement for a yearly rent entered into with the chowkeedar's immediate predecessor. There seems to have been some dispute about the payment of this rent. Anyhow, the chowkeedar complained that he was kept out of possession of the land set apart in payment of his services as chowkeedar. The effect of the Magistrate's order was to give him entire possession, with a warning against damaging the property.

We have already stated our opinion that a Magistrate has power to maintain a village chowkeedar in possession of the land set apart for his subsistence, and this is all that the Magistrate has done. It was for the other party, if he felt aggrieved, to apply to the Civil Court. The chowkeedar was bound to complain to the Magistrate.

In case No. 628, we cannot see why the Sessions Judge has made the reference. Admitting that the injury was of a civil nature, there is nothing in the law that prohibits a Magistrate from enquiring into any case of apparent injustice and oppression that is brought before him; and the Magistrate did not attempt to adjudicate the matter, or to decide on the respective titles of the parties concerned. He stopped the proceedings directly he ascertained the nature of the claim. We consider that this reference was unnecessary.

The 9th September 1864.

Present:

The Hon'ble F. B. Kemp, *Puisne Judge*.

**Being a member of an unlawful assembly—
Rioting, armed with a deadly weapon.**

Queen versus Mullookram Doss and others.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Sylhet, on a charge of being members of an unlawful assembly, &c.

This Court has no power to enhance a sentence (though it may consider it much too lenient) on persons convicted under Sections 143 and 148 of the Penal Code.

The prisoners have been convicted by the Sessions Judge of Sylhet under Sections 143 and 148 of the Indian Penal Code, and the aggregate sentence is two years' rigorous imprisonment.

They have been heard through a pleader, who contends that the Judge has rejected the evidence as to the murder of Gopal Singh, and the plunder of the kutcherry. He should have rejected the whole evidence on the principle of "*falsum in uno, falsum in omnibus*."

I have read the evidence, and I am satisfied that a very serious riot was committed by the prisoners and others, who are the partisans of Baboo Kishto Chunder Ghose, a local zemindar of some influence. The Sessions Judge appears to have discredited the evidence to the wounding of Gopal Singh and the plunder of the kutcherry. I must say that I see no good reason for discrediting that part of the evidence. But, be this as it may, making allowances for exaggerations which will occur in cases of this description, there is clear and direct evidence of a serious riot attended with wounding. One man, Teeluck, was seriously wounded, as reported by the Civil Surgeon.

It appears that Baboo Khelut Chunder Ghose, of Calcutta, has purchased a zemindaree in the Sylhet district. He has been opposed by a neighbouring zemindar, Baboo Kishto Chunder Ghose. The former Baboo held his kutcherry in the house of the witness Kasinath. This gave offence to Baboo Kishto Chunder, whose partisans attacked the kutcherry, armed with soolfees, swords, and other dangerous weapons.

The evidence for the defence is such as might be expected, and is quite insufficient to clear the prisoners.

I think the sentence much too lenient, but I have not the power to enhance it.

I also observe that Mullookram, the principal actor in the riot, is sentenced to the same term of imprisonment as the other

Vol. I. prisoners, who took but a subordinate part in the riot.

The Judge's conviction at the end of the proceedings does not correspond with column 10 of the abstract statement. I confirm the conviction and sentence, and I reject the appeals.

The 12th September 1864.

Present :

The Hon'ble G. Campbell, *Puisne Judge.*

Evidence—Former depositions of witnesses.

Queen versus Radhy Dharee.

Committed by the Officiating Joint Magistrate of Monghyr, and tried by the Officiating Sessions Judge of Bhagulpore, on a charge of house-breaking by night in order to commit theft.

The former deposition of a witness should not be read until after his examination in Court.

I do not consider that the evidence was legally and properly taken in this case. The Judge ought not to have begun by reading the former depositions of the witnesses. The prisoner was entitled to the benefit of fresh evidence, and to anything which he might have made of any discrepancies or deficiencies thence appearing. After taking the fresh evidence, former depositions might

then be referred to, for the purpose of refreshing the witness's memory, obtaining from him an explanation of discrepancies, or contradicting his present testimony. But till he has been examined on the case against the prisoners then in Court, he should not hear his former evidence.

As, however, some questions were put to the witnesses, and their testimony regarded facts, which, if true, are simple, I will not in the present instance reverse the conviction on this ground alone, hoping that the prisoner has not been substantially prejudiced. But I have had considerable doubts about it, and it must not be supposed that every other case so irregularly tried will stand.

Looking, then, to the merits of the case, I find that it is one of a doubtful character—an alleged recognition at night, and the discovery of certain property in the house of the prisoner's near relations in the same yard as his own house; also his subsequent conduct in flying from justice. These last circumstances may give color to the story of the recognition, but, unless we believe the recognition, they would not suffice. Upon the whole, I think, I am satisfied in considering the case one which might fairly go on the evidence to the Judge and the assessors, and that, they having unanimously found the prisoner guilty, the case is not one for the interference of this Court. I dismiss the appeal.

The 19th September 1864.

Present :

The Hon'ble G. Campbell and F. A. Glover,
Puisne Judges.

Levy of cost of Police from individuals.

Queen *versus* Rohimkant Ghose and Radha
Mohun Ghose.

*Committed by the Magistrate, and tried by the
Sessions Judge of Beerbhoom, on a charge of
breach of the peace.*

A Magistrate has no power to realize the cost of a constable from an individual.

It is quite clear that the order of the Magistrate to realize the cost of a constable from Rohimkant was illegal, and that the money levied from that individual should be returned. The Magistrate must not in these matters act according to his own ideas of what is "fair and equitable," but must keep within the law. He could only authorize deputation of police at the expense of the party making the application, under Section 13, Act V. of 1861, or obtain sanction of Government, issued through the Inspector-General of Police, to deputation of extra police and assessment of the cost under Section 15 of the same Act, or simply have sent the ordinary police to keep the peace. The Superintendent of Police should also be particularly instructed in such matters to keep within the limits of Section 16.

The 20th September 1864.

Present :

The Hon'ble F. A. Glover, *Puisne Judge.*

False evidence—Alternative conviction.

Queen *versus* Narain Doss, Okhoy Bhooya,
and Narain Mytee.

*Committed and tried by the Sessions Judge of
Midnapore, on a charge of giving false evi-
dence.*

False evidence. It being impossible to decide which of the prisoners' two statements was false, and which true, the prisoners were convicted on the alternative charge.

This case was remanded by Mr. Justice E. Jackson in order that evidence might be recorded to show which of the prisoners' contradictory statements was false—those made

before the Magistrate in the first instance, or those afterwards sworn to at the Sessions—the object being, if possible, to avoid an alternative conviction. No evidence on either point appears to have been taken on the first occasion; the conviction was based solely on the contradictory statements themselves.

The question of law as to whether Section 72 of the Penal Code was applicable to such cases has already been disposed of, and it only remains to decide which of the prisoners' statements is best supported by evidence.

In my opinion, the case is precisely in *statu quo*.

The Sessions Judge has recorded a quantity of evidence (without pronouncing any opinion himself). But it tells either way, some of the witnesses deposing that Nazeeb-oollah did point out the property, others that he did not.

I think, therefore, that we must revert to the original situation, and convict the prisoners on the alternative charge, it not being possible on the evidence recorded to decide which of the two statements was false, and which true.

I would therefore uphold the original conviction and sentence of the Sessions Judge, and reject this appeal.

The 23rd September 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,

Puisne Judges.

Insane persons.

Queen *versus* Sheikh Mustafa.

Committed by the Deputy Magistrate of Kendraparah, and tried by the Sessions Judge of Cuttack, on a charge of murder.

On the acquittal of an accused person on the ground of insanity, the Court should proceed under Section 394 of the Code of Criminal Procedure, and report the case to Government.

We have considered this case most attentively. We hold that the prisoner committed the act with which he is charged, but we acquit him upon the ground that, at the time at which he is charged to have committed the offence, he was by reason of unsoundness of mind incapable of knowing the nature of the act charged, or that he was doing what was wrong or contrary to law.

Vol. I. The Sessions Judge will proceed according to the provisions of Section 394 of the Code of Criminal Procedure, and report the case for the orders of Government.

The remarks of this Court will be forwarded hereafter.

The 26th September 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,

Puisne Judges.

Errors, quashing of proceedings—Jurisdiction of High Court (Questions of evidence).

Aneef Putney versus Ramsoonder Chuckerbutty, &c.

Committed by the Deputy Magistrate of Serajgunge, and referred by the Judge of Rajshahiye.

The error of a Deputy Magistrate in proceeding by warrant instead of by summons, furnishes no ground for quashing his proceedings.

The High Court has no power to interfere on a question of evidence.

We see no reason to interfere with the Deputy Magistrate's order in this case.

Admitting that, under the circumstances, the Deputy Magistrate should have proceeded by summons, and not by warrant, the error would furnish no ground for quashing his proceedings—Section 426 of the Criminal Procedure Code expressly providing that “no sentence of a competent Court shall be reversed or altered on account of any error or defect in the proceedings, unless,” &c., &c. (*vide* the Act).

With regard to the concluding portion of the Sessions Judge's remarks, we observe that the witnesses deposed to the presence of Puddolochun at the assault, and that, so far, the evidence against him was better than that adduced in his favor. But, were it otherwise, this Court would have no power to interfere, the question being one simply of evidence, and there being no error in any point of law.

The 26th September 1864.

Present :

The Hon'ble F. B. Kemp, *Puisne Judge*.

Charge of Judge—Misdirection to the Jury.

Queen versus Bustee Khan.

Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of extortion and obtaining gratification, other than legal remuneration, as a motive to do an official act.

In giving a warning to a Jury not to disbelieve a mass of otherwise consistent evidence, because in one or two minor and immaterial points the witnesses made different statements, a Judge exercises a wise discretion, and affords no ground for the objection of misdirection to the Jury.

This trial was held with the assistance of a Jury. The pleader for the appellant takes two grounds:—

1st.—Misdirection to the Jury.

2nd.—That the sentence is unnecessarily severe.

On the first ground the pleader contends that, as the Jury system is new to the country, and the native character is to do what the hakeem wishes, the Judge's charge in this case amounts to a "*hukum*" to convict. The passage in the charge which the pleader more particularly objects to is the following:—

"A large number of witnesses have sworn to the facts before related, and if a minor discrepancy in their statements is here and there discoverable, I do not think that such stress should be laid upon them as the vakce for the defendant urges, or that you should on such grounds only reject the whole of their testimony."

I am of opinion that, in giving this warning to the Jury not to disbelieve a mass of otherwise consistent evidence, because in one or two minor and immaterial points the witnesses made different statements, the Judge used a wise discretion. Native Juries are too apt to jump to the conclusion that because a case is weak in one point, the whole charge is false. That the Jury in this case exercised their own unfettered judgment is clear, for they acquitted the head police

officer. This shows that, rightly or wrongly, they weighed the evidence. The contention of the pleader on the first ground is therefore wholly untenable.

On the second ground I am of opinion that the punishment is not too severe. The prosecutor's son died a sudden but a natural death. The father, instead of burying the body, at once informed the police. The prisoner extorted money from the father under threat that, unless he paid the money, the body of his son would be sent into the sutler station on "the heads of the principal yots of the village." In addition to this, the prisoner and his companions were feasted at the expense of the prosecutor, who had to pay the moodie's bill. If such oppression is committed by the police, is it to be wondered that the community are reluctant to give information of crimes or of sudden, though perhaps perfectly natural, deaths?

I reject the appeal.

The 26th September 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,

Puisne Judges.

Evidence (of Wife against Husband)—Culpable Homicide not amounting to Murder.

Queen versus Gour Chunder Polie and

Dwarkee Polie.

Committed by the Deputy Magistrate and tried by the Sessions Judge of Dinagepore, on a charge of culpable homicide amounting to murder, &c.

The evidence of a wife is not admissible against her husband in corroboration of other evidence.

The prisoners having confessed that, having caught him in the fact of having sexual intercourse with one of them, they then and there killed him. HELD that the very grave provocation given to them was such as to reduce their crime from murder to culpable homicide not amounting to murder.

The prisoners, who are uterine brothers, have been convicted by the Sessions Judge of Dinagepore of murder, and the sentence submitted for our confirmation is death.

The prisoners are young men. Dwarkee is only 17 years old. They both confessed

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Vol. I. before the Deputy Magistrate to this effect, that, having caught the deceased Lamaroo in the fact of having sexual intercourse with the wife of the prisoner Dwarkee, they then and there killed him. The body of the deceased was subsequently removed by the prisoners from the scene of the crime, and thrown into a neighbouring piece of water, with a view to conceal the crime.

Beyond these confessions there is no reliable evidence of the prisoners' guilt; and, in justice to the prisoners, their confessions must be taken in their entirety. The Sessions Judge has examined the wife of the prisoner Dwarkee as a witness, and because in open Court, and in the presence of her relations, she does not admit that she had criminal intercourse with the deceased on the very day and time of the murder (though she freely admits that she had an intrigue with the deceased, and unblushingly names the spot in this case under a clump of bamboos where they used to meet for the purpose of carrying out this intrigue), the Judge considers that he has no alternative left but to look upon the case as "one of murder of the darkest dye."

We think that the evidence of the wife against her husband should not have been recorded. It is true that there are cases published in the earlier reports of Nizamut Adawlut in which the evidence of the wife has been received against the husband in "corroboration" of other evidence; but this practice has been reprobated by later decisions of the same Court, and is certainly opposed to the general principle of all criminal law. The Judge has quoted Section 20, Act II. of 1855; but this Section refers to civil proceedings. The Judge would hardly condemn a wife who committed perjury for her husband; and, on the other hand, he would most likely discredit her if she appeared too willing a witness against her husband.

Taking then the confessions of the prisoners which appear to have been voluntary, and which are quite consistent with the probabilities of this case as disclosed in the evidence, we hold that the very grave provocation given to the prisoners was such as to reduce their crime to culpable homicide not amounting to murder, and taking all the circumstances of the case into consideration, we sentence them, Gour Chunder to 5 years' rigorous imprisonment, and Dwarkee, in consideration of his youth, to 3 years' rigorous imprisonment.

The 26th September 1864.

Present :

The Hon'ble F. A. Glover, *Puisne Judge.*

False information respecting an offence committed.

Queen versus Cheetour, Chowkeedar.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Tirhoot, on a charge of giving false evidence.

A prisoner's intention is immaterial to his conviction under Section 203 of the Penal Code, of having given false information respecting an offence committed.

I see no reason to interfere with the Sessions Judge's order in this case. It is proved by evidence of the village headmen, that the prisoner, who was chowkeedar of the place, was called by them to view the body before being sent to report at the police station. This does away with the ground of his defence that he saw the corpse from a distance only, and did not observe the wounds in the throat and jaw, or suspect that the deceased had had foul play. It is impossible to believe that, after seeing the body within a distance, as he himself admits, of 10 or 12 feet (two lugges), and hearing besides the remarks of the villagers who were standing by, he could have gone off to the thanna in ignorance of what had happened; at all events, he must have known that the death was a very suspicious one. In the face of this, he reported that the man had died of cholera, and that there was nothing suspicious in the matter.

That he did so report is proved by the evidence of the police officers in attendance at the station, and by the authenticated copy of the police diary in which his report is mentioned.

It is difficult, no doubt, to understand what the prisoner's motive could have been in thus making a statement, the falsity of which admitted of such very easy proof. But, unless I am to believe that all the prosecutor's witnesses have perjured themselves for no conceivable reason, I must conclude on the evidence that the prisoner, knowing or having reason to believe that a crime had been committed, gave information regarding it which he knew or had reason to believe was false. His intention in so doing is immaterial to the present conviction, under Section 203 of the Penal Code.

The appeal is rejected.

The 26th September 1864.

Present :

The Hon'ble F. B. Kemp, *Puisne*

Unlawful assembly—Rioting.**Queen versus Khemee Sing and others.**

Committed by the Joint Magistrate, and tried by the Sessions Judge of Tirhoot, on a charge of obstructing a public servant in the discharge of his functions.

An assembly lawful in its inception may become unlawful by its acts. If force is used, the higher offence of rioting has been committed.

I have read the evidence in this case.

The assembly may not have been an unlawful one in its inception, but it clearly became so by the acts of the prisoners; and, as force was used, the higher offence of rioting has been committed. The conviction and sentence appear to me to be good. I refuse to interfere, and reject the appeal.

The 28th September 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Insane persons.

Queen versus Sheikh Mustaffa.

Committed by the Deputy Magistrate of Kendraparrah, and tried by the Sessions Judge of Cuttack, on a charge of murder.

The absence of all motive for a crime, when corroborated by independent evidence of the prisoner's previous insanity, is not without weight.

We have already expressed an opinion that the prisoner was not sane when he committed the crime with which he is charged, and have acquitted him on the ground that, at the time he committed the offence, he was incapable, by reason of unsoundness of mind, of knowing the nature of the act committed by him, so that he was doing what was either wrong or contrary to law. We directed the Sessions Judge to proceed under the provisions of Section 394 of the Code of Criminal Procedure.

We now record a few remarks for the information and guidance of the Judge.

The prisoner is charged with the murder of his wife and mother; his child was also wounded, but recovered under medical treatment. When the case was first before our learned colleagues, Justices Loch and Seton-Karr, they deemed it proper to remit the case in order that further evidence might be taken as to the sanity or otherwise of the prisoner. The Sessions Judge, Mr. Robert Alexander, has carried out their instructions most carefully; indeed his proceedings throughout the case are highly creditable to him.

We have most carefully considered the evidence in this case; and, though we are fully impressed with the danger to public safety that might arise, were we to infer insanity simply because there was no known or probable motive for the crime, we cannot but be of opinion that the absence of all motive, when corroborated by evidence of an independent character of the previous insanity of the prisoner, is not without weight.

In this case, although the medical officer reports and deposes that, during the month the prisoner has been under his observation, he has shown no symptoms of insanity, he hesitates to say that the prisoner may not have been insane at some former period. The neighbours depose to his insanity, and give instances of conduct on his part which are quite inconsistent with the theory that the prisoner is sane. His wife and mother, in their dying declarations, state that he was a good husband and son; that he never quarrelled with his wife; that he was quiet, but subject to fits of temporary insanity. With their dying breath, they emphatically deny that he committed a voluntary and premeditated murder. With all the evidence before us, we cannot but acquit the prisoner, leaving the Judge to take such steps for his future safe custody as the law sanctions.

The 28th October 1864.

Present :

The Hon'ble G. Loch, *Puisne Judge.*

Finding of Jury—Enhancement of Sentence.

Appeal from an order passed by the Sessions Judge of Dacca, dated the 20th July 1864.

Muneeram Chung, Appellant.

If a Sessions Judge thinks that a Jury is wrong in convicting a prisoner of culpable homicide, and not of murder, though he cannot interfere with the finding, he may sentence the prisoner to transportation for life instead of to ten years' transportation.

The High Court cannot enhance a legal sentence.

The prisoner has been convicted of culpable homicide by the Jury before whom he was tried, and has been sentenced to ten years' transportation. The Sessions Judge thinks the verdict wrong, and that the prisoner should have been convicted of the higher crime of murder. If the Judge thought so, though he could not interfere with the finding, he might have sentenced the prisoner to transportation for life. This Court cannot enhance the sentence passed on the prisoner,

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Vol. I. which is perfectly legal. The petition of appeal points out no defect either in the finding, or charge, or sentence, that is contrary to law, and, in the absence of any such specification, I reject the appeal.

The 4th November 1864.

Present:

The Hon'ble G. Loch and F. A. Glover.
Puisne Judges.

Unlawful assembly—Culpable homicide not amounting to murder.

Appeal from an order passed by the Sessions Judge of Dacca, dated the 1st July 1864.

Foiz Ali, alias Imdad Ali, and others.
Appellants.

To convict a prisoner of being a member of an unlawful assembly, and of culpable homicide not amounting to murder, it must be shown that he had an illegal object in common with, and took part in the illegal act done by, the others.

Mr. Justice Loch.—The facts proved in this case are: 1st, that the deceased, his son Affazooddeen, witness No. 1, and Kali Koomar Chuckerbutty, witness No. 8, went to Hillalooddeen's house to demand rent due by him to Kali Koomar. He promised to pay. While they were there, Tumceezooddeen, prisoner No. 24, who also cultivates some land from Kali Koomar, made his appearance, and Kali Koomar demanded from him the balance of his rent which had been assessed by arbitrators, of whom Affazooddeen was one, at Rs. 5. This sum Tumceezooddeen refused to pay, and the parties abused one another, Tumceezooddeen being joined by the other prisoners, who assisted him in abusing the opposite party. 2nd, that, as the deceased, his son Affazooddeen, and Kali Koomar, were leaving Hillalooddeen's premises, and had gone a short distance from it, Muncerooddeen, prisoner No. 25, ordered them to be seized, and the prisoners, Foiz Ali, No. 22, Jubber Ali, No. 23, and Tumceezooddeen, No. 24, appear to have gone

forward to obey the order. Foiz Ali evidently thought that the best mode of securing the person of the deceased was by knocking him down first, which he did, and killed him with the blow. 3rd, that, when Affazooddeen ran up to the assistance of his father, he was attacked by Jubber Ali and Tumceezooddeen, armed with bamboos, from one or other of whom he received a severe blow. But neither Hillalooddeen nor Nusseerooddeen appears to have taken any part in the assault upon the deceased or his son, and the evidence goes to prove that they were unarmed, and mere spectators of the attack. I do not think that these two prisoners can be considered members of an unlawful assembly. It is true that the six prisoners joined in abusing the deceased, his son, and Kali Koomar, but till Muncerooddeen gave the order to seize the deceased, they had no illegal object in common, and these two prisoners do not appear, from the evidence, to have done anything by which it could be construed that they took part in the illegal act done by the others. I convict Foiz Ali of culpable homicide not amounting to murder, under Section 304, and Jubber Ali, Tumceezooddeen, and Muncerooddeen of abetment, and confirm the sentences passed upon these prisoners by the Sessions Judge. I think that Hillalooddeen and Nusseerooddeen should be acquitted. The case will be sent to another Judge for his opinion regarding these two prisoners.

Mr. Justice Glover.—I concur with Mr. Justice Loch in acquitting the prisoners Hillalooddeen and Nusseerooddeen. So far from assisting in the object of the illegal assembly, they appear, from the evidence, to have exerted themselves in the first instance to prevent a disturbance, and there is nothing to show that, when the deceased was pursued and knocked down by Foiz Ali, they took any part in the attack, or were anything but mere spectators.

Hillalooddeen and Nusseerooddeen should be immediately released.

The 24th October 1864.

Present :

The Hon'ble G. Loch, *Puisne Judge.*

Trials by Jury—Appeal.

Queen versus Gopaul Bhareewalla and Bhelu Bhareewalla.

Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of culpable homicide.

In a case tried by Jury, unless the parties who appeal point out in what respect the law has been contravened, the appeal should be rejected.

The Judge has placed the case clearly and fully before the Jury. He has pointed out most properly the right that parties have to protect their own property, and how far that right extends, and has shown how it has been exceeded in the present instance. The Jury, on a consideration of the evidence, have convicted the prisoners on the charge of culpable homicide not amounting to murder.

The prisoners have appealed, but have not shown in what respect the finding or sentence is contrary to law.

As appeals in cases tried with the assistance of a Jury can only be on points of law, every petition of appeal should state distinctly in what respect the law has been contravened. It is not for the Court to hunt through the record, and find out any illegality that may arise; but it is for the parties who appeal to point out wherein there has been a departure from the law and, unless this be done, the appeal, except under special circumstances, should be rejected. I reject the petition of appeal, which states nothing but a desire to appeal because the parties have been convicted.

The 11th November 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Puisne Judges.*

Queen versus Akbar Kazee.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of rape and house-breaking by night.

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Sexual intercourse by a man with a woman without her free consent, *i. e.*, a consent obtained without putting her in fear of injury, amounts to rape; and the Judge should leave the question to the Jury, and not direct them to find that the woman's consent, after a considerable struggle, renders the charge of rape nugatory.

Mr. Justice Glover.—I see no reason to interfere in this appeal. The evidence regarding the house-breaking was fully laid before the Jury, and they were unanimous in convicting the prisoner.

I do not, however, think that the Judge's directions to the Jury on the first count was according to law. The evidence is very clear that the intercourse took place against the woman's consent in the first instance; and the mere fact of her having at last submitted through fear does not take the offence out of the category of rape. The Judge observes that the prisoner is "not a powerful man, and by no means strong enough to have accomplished his purpose unaided, unless she (the complainant) had given in;" but it must be remembered that the constable was not alone, but was accompanied by the chowkeedars who kept the door, and prevented all attempt at a rescue, and that the woman might very reasonably have been afraid of the consequences of her continued opposition, even supposing that she had physical strength sufficient to have resisted a man taking her unawares whilst she slept. It would, I think, be a very unsafe doctrine to presume an unfortunate woman's consent under such circumstances as these.

Whilst, therefore, rejecting the appeal, I would suggest that the Sessions Judge should be informed that the third description in Section 375 of the Indian Penal Code properly includes cases of the present sort, and that, unless the consent given is a free consent obtained without putting a woman in fear of injury, the offence committed would amount to rape; and that, in the Court's opinion, the Judge should have left the question to the Jury, and not have directed them to find that the woman's consent, after a considerable struggle, rendered the charge of rape nugatory?

The case must go before another Judge, with reference to the concluding portion of

Vol. I. my remarks. In the meantime, notice can be sent to the Sessions Judge that the present appeal has been rejected.

Mr. Justice Kemp.—I concur.

The 11th November 1864.

Present :

The Hon'ble G. Loch, F. B. Kemp, and F. A. Glover, *Puisne Judges.*

Charge of Judge—Misdirection to the Jury.

Queen versus Madhub Mal, Peeroo Sheik, Taboo Sheik, and Thakoor Doss Chowkeedar.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Moorshedabad.

Held by the majority of the Court that the omission of the Judge to enter into details regarding the identification of stolen property does not amount to a misdirection to the Jury.

Mr. Justice Loch.—I have been obliged to go through all the evidence in this case. The Judge, in his charge to the Jury, very properly pointed out the unsatisfactory character of the evidence as to the recognition of the prisoner, and the Jury very properly acquitted the prisoner on this head of the charge. But almost the whole of the same evidence was required to identify the stolen property, and it appears to me that sufficient caution has not been used to point out to the Jury the weakness of the evidence. The property recovered consisted of 18 articles, which at first sight the party robbed claimed as hers, except No. 18; when this property was mixed up with other articles of a similar kind, she identified eight articles, and was doubtful about five, which she said were pledged to her, and the other four she did not identify. Two witnesses were called to identify the property. Witness No. 3, Seetuck Kotal, identified two articles, —No. 2, a piece of cloth found in the house of Taboo, prisoner 60; and No. 13, that found in the house of Peeroo, prisoner No. 59, who stated that it belonged to his relative Ameeroodeen, who had been residing with him. Witness No. 4, Pabun Kotal, identified three articles, Nos. 5, 7, and 15. The two first were found in the house of Thakoor Doss, prisoner 61, who admits that they do not belong to him, but that he found them on the bank of a khal, two days after the dacoity. The third article, a *thal*, was found in the house of Peeroo, prisoner 59. Witness No. 8, Nundo Loll, identifies

article 5; and witness 10, Bishonath Dutt, recognizes article 13—so that, of the mass of the property, only five articles have been identified by the witnesses out of eighteen.

With regard to articles 2 and 7, there are good grounds for supposing them to be stolen property. The former is a chudder, from which a part had been torn off by the party robbed, and is still in her possession. The Jury satisfied themselves that the pieces corresponded. No. 7 is a *pandaun*, the lid of which was left behind by the dacoits. The lid in the possession of the party robbed fits the *pandaun* exactly. Article 5 (a *kotorah*), found with Thakoor Doss, and article 13, a *thal*, that found in Peeroo's house, are sworn to by the party robbed and two witnesses; and the mode in which Thakoor Doss accounts for his possession of No. 5 is very suspicious, and renders it most probable that the article in question does belong to Reboty. No. 13, however, is a *thal* bearing, as far as we can gather from the evidence, no particular marks, and identified in a very general way, nor does the prisoner claim it as his, but says that it belongs to his nephew, who is absent. Article 15 is another *thal* found in prisoner's house, which he claims as his own, though his witnesses do not prove it. Reboty, however, is not certain that it is hers, and though one witness for the prosecutor identifies it, the *thal* is just as likely to belong to the prisoner as to the party robbed, for it is an item of property found in most houses; nor is it shown that there is anything peculiar in this article. Had the evidence been put before the Jury with somewhat of this detail, it appears to me that they would have been unable to convict either Madhub, 58, or Peeroo, 59; and the omission of these details amounts in effect to a misdirection, for the attention of the Jury was not properly called to the character of the evidence. I would order a new trial as regards those prisoners.

Mr. Justice Glover.—The evidence against the prisoners Madhub Mal and Sheik Peeroo is doubtless weak, but I can find nothing in the Judge's charge amounting to a misdirection. It appears from that document that "the Judge read over the whole of the evidence to the Jury, calling their attention to the various prominent points," one of which was the prosecutrix's "doubts respecting some portion of the property found."

This refers to the *thalees* found in the houses of the prisoners, whose case is now under consideration, and further on in his

charge the Judge remarks:—"In the house of prisoner No. 58, Madhub Mal, were found several articles, about which he gave contradictory accounts before the Magistrate, and before the Court his own witnesses declare their inability to recognize the property as his. Whether the property is proved to be Reboty's is a material question for the Jury to decide. The case of 59, Peeroo Sheik, is very similar, but he added a plea of *alibi*, yet called no witnesses in support thereof."

And again—"The Jury must satisfy themselves as to this property belonging to Reboty, and the guilty knowledge of the accused Madhub, Peeroo, Taboo, and Thakoór Doss, chowkeedar."

From this it appears to me that the Jury were in a position to understand the whole facts of the case. All the evidence was read over to them, and they were specially desired to consider, amongst other things, whether the prosecutrix Reboty and her witnesses proved the *thales* found in the houses of Madhub and Peeroo to be part of the stolen property.

This, in my judgment, was all that the Judge was bound to lay before the Jury. The difficulty regarding the identification was brought prominently, though generally, to their notice, notwithstanding which they were unanimous in convicting all the prisoners.

There is nothing to lead me to suppose that the Jury (composed, as I should judge from the names, of intelligent and respectable men) were not perfectly aware of all the circumstances of the case before them, and the fact (if it be one) of the Judge's not having specifically eliminated one by one the points in the evidence for and against the prisoners, does not, I think, amount to a "misdirection," or give us any authority to order a new trial.

Mr. Justice Kemp.—I entirely concur with *Mr. Justice Glover*.

There has, in my opinion, been no misdirection to the Jury in this case. On the contrary, the Judge impressed upon them the importance of weighing the evidence produced on the point, whether the property found in the possession of the prisoners Madhub Mal and Peeroo Sheik belonged to the complainant or not. The Jury who, from the questions put, appear to have paid due attention to the trial, were surely equal to the task of coming to a right conclusion as to whether certain brass utensils had been sufficiently identi-

fied as belonging either to the complainant or to the prisoners, whose evidence to ownership, I may observe, was not satisfactory. I would confirm the conviction, and can see no necessity for a new trial.

The 11th November 1864.

Present :

The Hon^{ble} F. B. Kemp and F. A. Glover,
Puisne Judges.

Culpable homicide not amounting to murder.

Queen versus Suleem Sheik.

Committed by the Magistrate, and tried by the Sessions Judge of Jessore, on a charge of culpable homicide amounting to murder, &c.

The prisoner, having struck the deceased a hasty though fatal blow with a stick in his hand at the time, for abusing his mother, was held guilty of culpable homicide not amounting to murder, and not of murder.

The prisoner has been convicted by the Sessions Judge of Jessore of the crime of murder, and has been sentenced to death, subject to the confirmation of this Court.

The deceased, by name Shera, was a slave girl, and it appears that the prisoner cohabited with her. The weapon used was a thick heavy babool stick; one blow was inflicted on the head, which fractured the skull. The frontal, both the parietal and the occipital bones were smashed to atoms.

The prisoner, in the Sessions Court, admitted that he struck the woman. He pleads that she abused him, and that, unable to control his anger, he struck her with the stick which was in his hand at the time, and that he had no intention to kill her.

The abuse was directed to the mother of the prisoner; and taking into consideration how sensitive natives are to abuse levelled at their female relations, and more particularly against a mother, and giving weight to the fact that the stick was not sought for, and that only one hasty though fatal blow was given, we convict the prisoner of culpable homicide not amounting to murder, inasmuch as the act was committed without premeditation and in the heat of passion upon a sudden quarrel (see Exception 4, Section 30, Indian Penal Code); and we sentence him, taking all the circumstances of the case into consideration, to ten years' rigorous imprisonment, under Section 304 of the Indian Penal Code.

The 12th November 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Magistrates not to induce prisoners to confess.
Queen versus Ramdhun Sing, Pultoo Sing, Heera Sheik, and Luchmun Mundul.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Beerbhoom, on a charge of theft.

A Magistrate acts without due discretion when, as a prosecutor, he holds out promises to prisoners as an inducement to them to confess.

With the exception of the prisoner Horin, the appellants in this case admitted, more or less completely, their connection with the robbery; and Horin's defence that he was not on guard during the night in question is not only utterly unsubstantiated, but is directly opposed to the evidence of the prosecutor's witnesses. I see, therefore, no reason to interfere with the sentences passed upon Ramdhun Sing, Pultoo Sing, and Heera Sheik, which, even setting aside the *quasi* confession of the two former, are quite justified by the evidence.

With regard to the prisoner Luchmun, I think the Sessions Judge's sentence should be somewhat modified. That this prisoner assisted in concealing the stolen property, there can be no doubt; but there is nothing in the case against him which renders an unusually severe sentence necessary. The limit of imprisonment under Section 414 is three years; and this punishment would, I think, be sufficient without the imposition of a fine of 500 rupees, which, considering the prisoner's *status* in life, is merely another form of giving him an additional nine months in jail. I propose to modify the Sessions Judge's order so far.

I think also that some notice should be taken of Mr. Rait's conduct. According to his own statement, he told the prisoners that, if they confessed "to the Magistrate, they would get off;" and his position as an Honorary Magistrate in the district, no doubt, gave his statement an air of authority to the prisoners, and most probably influenced their after-proceedings.

The case must be submitted to my colleague, Mr. Justice Kemp.

Mr. Justice Kemp.—I concur with Mr. Justice Glover in modifying the sentence of the prisoner Luchmun to the extent proposed by my learned colleague. I think Mr. Rait

should be informed that he acted without due discretion in his position of Honorary Magistrate, in holding out promises to the prisoners as an inducement to them to confess. It would appear that Mr. Rait, in his capacity of prosecutor, lost sight of his duty as an Honorary Magistrate.

The 18th November 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Whipping (in addition to imprisonment).

Queen versus Kantiram and Meekeer.

Committed by the Magistrate, and tried by the Judicial Commissioner of Assam, on a charge of theft.

Whipping cannot be added to a sentence of imprisonment in the case of a first conviction for the offence under punishment.

The Sub-Assistant Commissioner has, according to his own admission, mistaken the meaning of Section 3, Act VI. of 1864; and there is no evidence on the record to prove that the prisoners have ever before been convicted of the offence for which they have now been punished.

Under such circumstances whipping could not be added to a sentence of imprisonment (*vide* Circular No. 2, dated April 15th, 1864), and this portion of the punishment is accordingly remitted. The Lower Courts decision will be altered accordingly.

The 18th November 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Defamation.

Queen versus Hem Chunder Mookerjee.

Committed by the Cantonment Magistrate of Barrackpore, and tried by the Sessions Judge of the 24-Pergunnahs, on a charge of defamation.

A simple assertion (nowhere disproved) regarding the way in which a *serishtadar* had issued *perwannahs* in an arbitration suit does not amount to defamation.

We agree with the Sessions Judge in thinking this conviction altogether illegal. No charge was preferred, and no defence taken. Nor from such evidence as is recorded, does it appear to us that Hem Chunder Mookerjee could have been convicted under the Indian

Penal Code. He simply made an assertion, which has nowhere been disproved, regarding the way in which the serishtadar had issued certain perwannahs in an arbitration suit. For anything apparent on the record, this assertion might have been perfectly true; but in any case it would not amount to defamation, which we presume to be the offence of which the Cantonment Magistrate considered the defendant to be guilty.

The conviction must be quashed, and the fine be returned.

The 18th November 1864.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Theft and Assault (Dismissal of charge for default).

Queen versus Jodoo Paharee.

Tried by the Deputy Magistrate, and referred by the Sessions Judge of Midnapore, on a charge of theft and assault.

A charge of assault and theft should not be dismissed for default of complainant's attendance.

We think that the Deputy Magistrate was wrong in dismissing the case for default. Setting aside the question whether or no complainant was in attendance at the kutcherry on the day appointed for the trial, the charge preferred was an assault and theft referable to the 14th Chapter of the Criminal Procedure Code, and could not be dismissed merely because the complainant was not present. The offence was one against society, as well as against an individual; and this Court's letter No. 460, dated 11th June 1864, had reference only to cases under Sections 259 and 269 of the 15th Chapter of the Code of Criminal Procedure.

The Deputy Magistrate's order of dismissal in default must be rescinded, and the trial will proceed in due course.

The 21st November 1864.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Magistrate's orders in Civil Case (Reversal of).

Queen versus Sheikh Meerun.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of encroachment on certain lands.

The reversal of a Magistrate's order in a purely civil case, though it may deprive the petitioner of an immediate remedy, is necessary to prevent his being prejudiced in his civil remedy.

The dispute in this case being one of a purely civil character, the Magistrate was clearly wrong in taking action in the matter. It may be that the petitioner is deprived of an immediate remedy by the reversal of the Magistrate's order; but, as observed by the Judge, those orders ought to be formally quashed to prevent the petitioner from being prejudiced in his civil remedy.

The 21st November 1864.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Possession of land—Section 318 of Criminal Procedure Code.

Queen versus Sager Mahomed and others.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Chittagong, on a charge of depriving the right of way and the use of certain pasturage.

The Deputy Magistrate's order, awarding absolute possession of the land to the plaintiff, was quashed (1) because the Deputy Magistrate was bound, under Section 318 of the Criminal Procedure Code, to enquire into the fact of possession and decide accordingly; and, according to his own statement, the possession was found in the defendant; and (2) because the plaintiff claimed only a right of way over the land, and not possession of it.

The Deputy Magistrate's order in this case is clearly illegal, even admitting that he thought it probable that a breach of the peace might occur. He was bound, under Section 318 of the Criminal Procedure Code, to enquire into the fact of possession only, and to decide accordingly. Now, according to his own statement, possession was found in the defendants, inasmuch as they are admitted to have sown the land, and to have held it till the dispute arose.

The Deputy Magistrate has, moreover, given the plaintiff a decree for absolute possession of the land, whereas he only claimed a right of way over it.

In no point of view, therefore, can his order be sustained, and we quash it accordingly.

The 22nd November 1864.

Present:

The Hon'ble F. A. Glover, *Puisne Judge.*
Queen versus Gunga Bishen and others.

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Judge's charge to the Jury.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of grievous hurt.

A Judge, in charging the Jury, should avoid expressing any decided opinion. All that a charge should contain is a statement of the evidence *pro* and *con*, with a running commentary as to its agreement or disagreement with the other facts of the case.

The appellants in this case urge that there is no proof on the record that they were members of an unlawful assembly with a common guilty object, or that they directly participated in the violence used against the wounded prosecutors. They object also generally to the tone of the Sessions Judge's charge as likely to influence the Jury against them, and to the sentences as disproportionately severe.

The first objection is valueless. There is abundant evidence on the record regarding the nature of the assembly, and the Jury considered it worthy of credence. To believe the evidence is to believe that there was an unlawful assembly, and that the prisoners were members of it. The one includes the others.

With regard to the second, although I find nothing in the Judge's charge that can be said to amount to a misdirection, I think it would be as well if he refrained for the future from expressing his opinion so decidedly. Native Juries are in all cases too apt to follow what they imagine to be the opinion of the presiding officer, and any expression of the Judge's own sentiments should be avoided. The most, I conceive, that a charge should contain is a statement of the evidence *pro* and *con*, with a running commentary as to its agreement or disagreement with the other facts of the case.

I see, however, no reason to suppose that the Jury in the present case gave anything but their own deliberate verdict—a verdict certainly in accordance with the evidence.

I reject the appeal. The sentences, I remark, are by no means heavy, the nature of the offence being considered.

The 22nd November 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Oppression and extortion practised on persons lawfully confined.

Queen versus Shumbhoonath Panday and Juggobundoo Mozoomdar.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of the 24-Pergunnahs, on a charge of wrongful confinement.

Appellant charged the prosecutor with theft, and he was handed over to the police. HELD that the police, and not the appellants, are responsible for any oppression or extortion practised by the police on the prosecutor while in confinement.

Mr. Justice Glover.—I do not think that this conviction can be sustained. That the man Doyal stole the money is admitted, as proved by the Deputy Magistrate himself; and, that being the case, the appellant Shumbhoo was clearly right in making the man over to the police constable at the pharee, and the confinement, so far as he is concerned, cannot be called wrongful, nor can the detention there be laid to the appellant's charge, inasmuch as the man Doyal was from the date of his arrest in the custody of the police; and if the constable chose to behave illegally (even granting for the sake of argument that it was in collusion with the appellants), that could not make he latter responsible. As for the alleged ill-treatment, there is no evidence beyond the statement of the complainant himself. The other witnesses who saw him at the pharee distinctly say that he made no complaint, and never said that he had been maltreated. The fact of Doyal's having paid back a portion of the money he had taken does not affect the legal point in this case; for, if the extortion was caused by the wrongful confinement, the consequences would fall on the person who caused that confinement—in other words, on the police constable.

I am of opinion, therefore, that the charge of illegally confining Doyal for the purpose of extorting money cannot stand against the appellants; the confinement being made on the sole authority of the police constable, and that, legally, the appellants are entitled to their release.

The case must go before Mr. Justice Kemp.

Mr. Justice Kemp.—I concur. If there has been any oppression or extortion in this case, the police are responsible, and not the appellants. The appellants charged the prosecutor with theft, and he was handed over to the police. The police are answerable for this procedure in the case, and not the appellants; and there is no proof, in my opinion, of instigation.

I concur in acquitting the prisoners.

The 23rd November 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Robbery or Theft, and dishonestly receiving.

Queen *versus* Sheikh Muddun Ally and another.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of robbery, &c.

A person convicted of robbery or theft cannot be also convicted of dishonestly receiving in respect of the same property.

Mr. Justice Glover.—I see no reason to interfere with the sentence passed on the prisoner Muddun. He admits that he was in possession of the prosecutrix's purse and money, and his account of how he came by it is directly opposed to every possible presumption; whilst that, instead of trying to return the property to its rightful owner, he ran off with it, directly he saw the prosecutrix, is proved by the evidence of three witnesses.

With regard to the other prisoner, Sheikh Amanollah, the sentence should, I consider, be amended. He has been convicted of robbery and of dishonestly receiving part of the stolen property. Under the circumstances, the two offences are identical, the one being a necessary sequence of the other. I have already expressed my opinion (Bhyrob Seal and another, appellants, 2nd May 1864) that a person convicted of robbery or theft cannot be also convicted of dishonestly receiving in respect of the same property.

This ruling was adopted by a majority of the Criminal Bench then sitting, and is a precedent which must be followed in the present case.

The sentence of three months' imprisonment passed on Sheikh Amanollah on the 2nd count should be reversed; that of six months' rigorous imprisonment on the 1st count will stand.

The paper must be laid before Mr. Justice Kemp, with regard to that portion of the Sessions Judge's decision which I propose to reverse.

Mr. Justice Kemp.—I fully concur.

The 22nd November 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

**Rape (Death of child by)—External signs
of violence.**

Queen versus Bancee Madhub Mookerjee.

*Committed by the Magistrate, and tried by the
Judicial Commissioner of Chota Nagpore, on
a charge of rape and culpable homicide.*

Held to be improbable, and physically impossible, that a girl of tender age should be killed by any violence in rape, and not show any external signs of violence.

Mr. Justice Glover.—The evidence in this case does not satisfy me. The prisoner has been convicted under Section 304 of the Indian Penal Code of culpable homicide not amounting to murder in causing the death of a girl named Acharjea, and has been sentenced to two years' rigorous imprisonment. The Judicial Commissioner, in opposition to the opinion of the Assessors, who tried the case with him, considers it proved that the girl was enticed away for the prisoner's purposes; that he had sexual intercourse with her; and that she died from the effects of that intercourse a few hours after. The evidence on these points being the depositions of the woman in whose house the girl was living, and that of two goraitis, a so-called dying declaration of the girl herself, and the professional testimony of the native doctor who examined the body, with that of the midwives who attended Acharjea before her death.

Now, with regard to the conveying off of the girl by Mussamut Tekonee and her son Beharee, I consider the evidence very unsatisfactory. Mussamut Bowdee herself states that the girl was taken off about one ghurree before dark (she did not see her go by the way), *i.e.*, about half-past 5 o'clock. But she took no steps to ascertain what had become of her, made no enquiries in the village, and was next morning going quietly on her way to visit her mother, when she found the girl lying near Kurshud Ali's shop in a helpless state, and complaining, on being questioned, that the prisoner had ravished her, and turned her out of the house. Gojur Dosadh, the next witness,

deposes that the girl was brought to the prisoner, who was standing under a tree in Kurshud Ali's homestead, at *midnight*. That the girl objected and refused to go with Bancee Madhub, and cried out. This witness was on duty at the time and going his rounds: he refused to interfere then, but next morning he went to Mussamut Bowdee's house (why, is not stated), and saw the girl lying there. Acharjea did not speak, but complained of her loins (I do not exactly understand this part of the evidence, nor how she could complain at all of her loins unless she spoke—but this by the way), on which the witness went off at once to the thanna. No complaint had been made, and the girl had not told him what had happened to her; but notwithstanding Gojur went off at 12 o'clock to report. The discrepancy of time is, moreover, not accounted for. The witness says that he went to Bowdee's house very early in the morning—about 6 o'clock we may suppose; and, after seeing the girl's state, started off at once to report; but he admits in the course of his evidence that he did not go there till 12 o'clock. The only other witness as to this part of the case is Gojur, a Dosadh, who saw the girl lying near Kurshud Ali's back door, and the woman Bowdee and Tekonee raising her up; he deposes, moreover, to having heard the prisoner, who was near, tell them to take the girl away.

In all this I can find no satisfactory proof that the girl was either enticed away by Tekonee and her son, or that she went to the prisoner's lodging at all. The first point depends entirely on the evidence of one witness, which is opposed to that of the woman Bowdee herself; and that the Lower Courts did not believe it, is clear from the fact that these two persons, *i. e.*, Tekonee and her son, were acquitted and released. The utmost it proves is that, on the day of her death, the child was seen lying near Kurshud Ali's house in a dying state.

I come now to the declaration of the girl herself. The Police Inspector deposes that, after repeated questionings, she stated that a fat Brahmin in Kurshud Ali's house had had connexion with her, and had broken her loins; she is said to have died within a few minutes of making this declaration. Two other witnesses depose similarly, with this difference, that one of them, Ikbul Alee, states that the girl spoke to him; the other, Ram Surn, that she told her story to the midwives who were in attendance. Now, of these

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Vol. I. women, three in number, two have deposed that the girl said *nothing at all* whilst they were present, and they were the persons who helped to take her into the verandah, where it is admitted by all the other witnesses that she died at once without saying anything. These two midwives state that the girl had her loins broken from having had connexion with a man; but a third woman of the same profession, who declared that Acharjea was suffering from cholera, was ordered off promptly by the Police Inspector, and had not been produced as a witness—why, that functionary probably knows best.

All these witnesses admit that the girl died directly she was brought into the verandah. They admit moreover that, at the time of her death, she was evacuating and vomiting, and that there were no marks of blood upon her clothes, which Mussamut Bowdee allows to be the same as those she had on when she went away the evening before.

There is also a quantity of evidence to prove, what is indeed admitted on all hands, that cholera was raging in the village at that time, and that many people were dying of it daily.

In my opinion, it is no way proved that the girl ever made any declaration at all. The evidence on this point is directly and hopelessly contradictory. The midwives who examined her, and gave their opinion in conformity with the Inspector's wishes (I assume this, as he ordered the third midwife away for suggesting that the disease was cholera), and who were with her all the time, and assisted in carrying her into the verandah, where she died immediately, and without speaking, declare most positively that the deceased never said a word about having been ravished by any one, or about anything else, in fact, she having been from first to last speechless. There is no getting over this.

I come in the last place to the professional testimony. The native doctor who examined the corpse found the entrance to the vagina torn open, and a quantity of blood extravasated in the pelvis; he found also extensive inflammation of the intestines and kidneys. He considered that death had resulted from the girl's having had connexion with a man before arriving at puberty. Now, I am naturally unwilling to interfere in a matter of medical testimony, but the native doctor's evidence appears to me not only improbable, but actually incredible. All our Medical Jurisprudence Books—Taylor, Chavers, and others—agree on this point, that, when a rape is committed on a child of tender

age, the most palpable outward signs of the offence remain. Had Acharjea been treated as she is said to have stated, her private parts must have been inflamed and wounded, and her clothes (the same, be it remembered, as those in which she was carried off) must have been bloody, and otherwise stained. For a young girl not arrived at the age of puberty to have been raped, and not to show any external signs of it, is a physical impossibility.

Again, it is admitted that the injuries found by the native doctor might have been caused by a fall. It is admitted, moreover (and this a very important point), that they might have been caused by the midwives' own examination, which is made with the hands. My own opinion is that they were so caused, and that the thrusting the hand into the person of a young immature child was quite sufficient to account for the rupture of the entrance of the vagina. In any case, I entirely disbelieve that they were caused by a man having had connexion with her.

The medical evidence shows that the girl had inflammation of her intestines and diarrhoea; it is proved that cholera was raging; it is proved also that, at the time of death, Acharjea was evacuating and vomiting.

Taking all this evidence into consideration, I hold this to have been the cause of her death (for the injury to the womb, however caused, could not have killed her in less than twelve hours), and the charge against the prisoner is, in my judgment, absolutely false.

Under ordinary circumstances, I should have contented myself with recording my voice for acquittal, but I cannot omit from my judgment a decided opinion that this case has been got up by the police, and that there is not a particle of truth in it from first to last.

The papers must be laid before my learned colleague, Mr. Justice Kemp.

Mr. Justice Kemp.—The prisoner Banee Madhub Mookerjee was committed on three counts; 1st, rape; 2nd, culpable homicide; 3rd, grievous hurt.

The Assessors acquitted on all the counts. The Judicial Commissioner of Chota Nagpore has convicted the prisoner, and sentenced him to 2 years' rigorous imprisonment.

I have read the whole of the evidence in this case, and I am not satisfied that the charge is true. On the contrary, I am of the same opinion as my learned colleague, that this case has been got up by the Inspector of Police, Lal Mohesh Narain. The medical

testimony of the native apothecary is very unsatisfactory, and throws much doubt and uncertainty on the cause of the death of the girl. The girl was fourteen years old (*see* evidence of her guardian, Mussamut Bowdee). Native girls are mothers at eleven years. The Judicial Commissioner infers that the girl consented to have sexual intercourse with the prisoner. Under such circumstances it is highly improbable that the girl should be killed by any violence used by the prisoner in the act of coition, and yet that

the pudenda should have no marks of violence; but such is the statement of the native apothecary. I cannot believe that the prisoner had connexion with the deceased, who, in my opinion, died a natural death. The injury to the womb noticed by the native apothecary may have been caused, as admitted by him in his examination, by the manual examination of the native midwives, who appear with one exception to have played into the hands of the Inspector. I fully concur in acquitting the prisoner.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,

Exception 4, Section 300, Penal Code—Culpable Homicide—Unpremeditated assault ending in an affray in which death is caused.

Queen versus Zalim Rai and others.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Sarun, on a charge of murder, &c.

An unpremeditated assault (ending in an affray in which death is caused) committed in the heat of passion upon a sudden quarrel (it being immaterial which party offered the provocation, or committed the first assault) was held to come within Exception 4 of Section 300 of the Penal Code.

Mr. Justice Kemp.—The Deputy Magistrate committed two parties to the Sessions, being of opinion that an affray had taken place respecting a boundary dispute, in which Kashee Roy was killed by a blow on the head from a *latee*, and Roshun Roy was severely assaulted. The Judge, however, was of opinion that there was no mutual fight, and that Zalim Rai and his party were the aggressors, and alone committed the act of violence detailed above. The Judge observes that, "had there been a stand-up fight between the two parties, the case might have been brought under Exception 4, Section 300 of the Penal Code."

The Judge, holding that there was nothing to reduce the crime to culpable homicide not amounting to murder, convicts all the prisoners of murder, and, without making any distinction, sentences them all to transportation for life, remarking that "a conviction under Section 302 does not permit of any less severe sentence."

Mr. Gregory, for the prisoners, contends that the affray was a mutual one, in which the opposite party got the worst of it; that in the *mêlée* sticks were freely used, and one man on the opposite side unfortunately killed. He therefore asks the Court to mitigate the punishment.

On referring to the diary of the Inspector of Police, I find he treats the case as one of affray. After arriving on the spot, and before the parties had time to make up a case, he enquired, and reports the result in these

"On the 16th October, Zalim had gone to cut his crop, and, either through enmity or mischief, cut a portion of Soobuk Rai's crop. Soobuk Rai, on seeing this, got offended, and abused Zalim Rai; high words ensued, and they fought with each other. This happened at 12 o'clock. Again, at 6 p.m., Zalim Rai and Goluck Rai had words, at which the relations of Zalim Rai turned out with *latees*, and those of Soobuk Rai followed the example; a fearful fight ensued, in which Kashee Roy met his death, and several others on both sides were severely wounded."

The Deputy Magistrate, Mr. O'Reilly, treated it as an affray.

I have carefully considered the evidence in this case, and have come to the conclusion that the quarrel arose out of a boundary dispute, a fruitful subject of strife, particularly in the Behar Provinces. Zalim Rai appears to have been the head of his party; his sons are amongst the prisoners. Soobuk Rai and the deceased were amongst the most influential of the opposite party. All were Rajpoots, in the habit of handling their *latees* freely in disputes of this nature. A fight took place between the parties. Soobuk Rai's party were worsted, though not without inflicting severe injuries on some of the opposite party. This is admitted (and see the reports of the medical officers).

I therefore think that this is clearly a case coming under Exception 4 of Section 300 of the Indian Penal Code. The homicide of Kashee Roy was committed without premeditation, in a sudden fight, in the heat of passion; no undue advantage was taken, and the act was not a cruel or deliberate one. I would convict the prisoners of culpable homicide not amounting to murder, and sentence Zalim Rai, the leader, to 5 years' rigorous imprisonment, and the rest, his relations and partizans, to 3 years' rigorous imprisonment.

The papers must be submitted to Mr. Justice Glover.

Mr. Justice Glover.—The common object of the prisoners, as detailed by the Sessions Judge, was to punish Soobuk Rai for his interference in the matter of the barley field. On their way to deal with him, they were met by Roshun and Kashee, who remonstrated and warned them of the consequences. They met the usual fate of those who thrust themselves into other persons' quarrels, and were so severely beaten with *latees* that one of them died. Their

Vol. I. friends had previously come up to their rescue, and the result was a general stand-up fight, in which members of both factions were more or less wounded.

Now, the common object of the illegal assembly was confessedly to punish Soobuk. Roshun and Kashee interfered with their advice, which, in the excited state of Zalim Rai's party, had the effect of turning the wrath of the assembly upon themselves. But to beat them formed no part of the rioters' intention, and therefore the death of Kashee cannot be said to have occurred through carrying out the common object of the prisoners, which was, as I said before, to punish Soobuk, and not either Kashee or Roshun.

I fully concur, therefore, in opinion with Mr. Justice Kemp, that this case comes within Exception 4 of Section 300 of the Penal Code. The assault on Roshun and Kashee, and which afterwards swelled to an affray, was unpremeditated; it was committed in the heat of passion upon a sudden quarrel, and it was immaterial which party offered the provocation or committed the first assault.

I modify the Sessions Judge's sentence as proposed by my colleague.

The 5th December 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Mookhtars (Dismissal of—by Magistrates).

Queen versus Sham Chand Chowdry.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Beerbhoom, on a charge of adultery, &c.

A Magistrate has no power to dismiss a Mooktear generally, unless he be convicted of an offence involving moral turpitude or infamy.

The Court does not exactly understand how this reference has been made so long after all occasion for interference has passed. The order complained against is, the Court observes, dated more than a year ago.

As the sentence of the Deputy Magistrate has long since been carried out, and as the evidence on which that sentence was passed is not before us, we think it unnecessary to take action in the matter, merely observing that there is nothing in the law to prevent a plaintiff amending his charge if he think fit to do so before trial; and this, after all, is what the complainant appears to have done.

With regard to the second part of the Judge's reference, we think that, under the ruling by the late Sudder Court, dated December 23rd, 1859, Umrit Lall Banerjee, petitioner, a Magistrate has no power to dismiss a mooktear generally, unless he be convicted of an offence involving moral turpitude or infamy. This, of course, refers to a "general dismissal" only, and not to particular cases in which he might refuse to hear a mooktear whom he did not think qualified.

The 5th December 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Jurisdiction (of Magistrates)—Section 458, Penal Code.

Queen versus Shadry, alias Oghurry Malakur.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Dinagepore, on a charge of house-trespass.

A Deputy Magistrate has no jurisdiction in the case of an offence coming under Section 458 of the Penal Code.

We quite agree with the Sessions Judge that this case was one in which the Deputy Magistrate had no jurisdiction. It was triable in the Court of Session alone. The prisoner, armed with a large knife, broke into the house of the prosecutor after midnight, and, seating himself upon his chest, demanded his money, threatening to take his life in the event of his refusing to give up his money. It appears to us that the offence comes under Section 458 of the Indian Penal Code, and, if so, that the Deputy Magistrate had no jurisdiction. The proceedings must be quashed.

The 5th December 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Affray respecting land ending fatally—Punishment for the defensive party.

Queen versus Shunker Sing, Kukhoor Sing, Nowrunjee Sing, Peman Sing, and others.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Patna, on a charge of culpable homicide.

In an affray respecting land, one party were the aggressors, and the other side (had the affair not ended fatally)

would have been in the legal exercise of the right of defence of property, and would have been entitled to the benefit of Section 104 of the Penal Code.

Held, that one year's rigorous imprisonment was sufficient punishment for the latter.

Mr. Justice Kemp.—This trial was conducted with a Jury. There were two parties committed, and the offence arose out of a dispute respecting land. The Deputy Magistrate, who visited the spot, was of opinion that the scene of the riot was at the place marked C in his sketch. The two stories told by the contending parties are wholly irreconcilable one with the other; and that one of them must be true and the other false is clear. One party were the aggressors, and the other were exercising the right of defence of property.

Sooful Sing's party assert that they were employed in the field, marked C A in the sketch, when Shunker Sing's party came up, and uprooted the crop. Some of Sooful Sing's party remonstrated; at this stage of the case Sooful Sing came up, when Shunker Sing on the other side hit him with a *latee* on the head, and felled him to the ground. Sooful Sing was taken to the hospital on the 5th of August, and died on the 11th from compression of the brain. See the evidence of the native doctor.

Shunker Sing's party, on the other hand, aver that they were peaceably employed in weeding the field marked C in the sketch, which had been lately decreed to them in an Act X. suit, to which Sooful Sing and others were a party; that they were attacked and ill-treated by Sooful Sing's party; that, after the attack had ceased, the party of Sooful Sing, finding that they were in the wrong, and dreading the consequences of their unlawful acts, agreed to sacrifice Sooful Sing a used-up man to the common cause; and that, with the view of giving the case the color of a mutual affray, Sooful Sing's own son, with the consent of his father, struck Sooful Sing on the head, and thus caused his death.

Both parties were committed on a charge of riot, and Shunker Sing was charged in addition with culpable homicide not amounting to murder, and his partisans with abetment of that offence.

The Sessions Judge, in his charge to the Jury, directs their attention to the conflicting character of the evidence and the great difficulties of the case. He admits that there is great enmity between the parties, and that the witnesses are violent partisans.

He then observes that, "if the violence took place at the field marked C, it was a

purely malicious destruction of crops out of revenge for having lost their suit." He further remarks that "there is such a bitter hostile feeling between the parties as to account for either inflicting upon the other any annoyance in their power;" and that he is unable, "looking to the circumstances out of which the parties respectively aver that the dispute arose, to see any difference in probability either way." The Judge concludes his charge with these remarks: that, "if the Jury found that Sooful Sing died of a blow received on the field marked C A, which is situated by the road-side, they could not find otherwise than that there was a riot, and the consequence was that every party concerned would be responsible for the homicide; if they found that the riot took place on the field A, they must acquit Sooful Sing's party. If, on the other hand, they found that it occurred on the field marked C, they must convict Sooful Sing's party of the riot, and further proceedings would have to be taken against them for the higher offence of wilful murder." In either case, the Judge observes: "The evidence, in as far as it discloses that one party was acting on the defensive for the protection of their property from wanton destruction, is such that, if believed, that party is entitled to an acquittal."

The Jury, without finding which story was the true one, brought in a verdict of riot against all the prisoners; and an additional one of culpable homicide not amounting to murder against Shunker Sing, and abetment of the said offence against his partisans.

The Judge has sentenced Shunker Sing to seven years' transportation; his partisans Kukhoor, Nowrunjee, and Peman to five years' rigorous imprisonment; Sumbul Sing, Choolun, son of Sooful Sing, Choolun 2nd, and Buggun to one year's rigorous imprisonment.

Both parties appeal; each party sticks to the story originally told by them. The pleader for Sumbul Sing and others urges that, if the other party were the aggressors, they were acting in self-defence, and are entitled to an acquittal. The opposite party, through their learned Counsel, contend that the two cases are separate, and that there has been no finding upon the truth of the conflicting averments; that at any rate, if there was a riot in which Sooful Sing met his death in the *melée*, their party should not have been sentenced more severely than the other party.

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I have read the evidence in this case. Nine witnesses were examined before the Sessions Judge. Of the six who deposed on the side of Sooful Sing's party, one says there was a mutual fight, but that he recognized none of the parties; one was wholly discredited by the Judge, and is said to have told a palpable falsehood; and four depose wholly in support of the averments of the party represented by Sumbul Sing, Choolun, &c. Three witnesses, on the other hand, depose wholly in support of the story told by Shunker Sing and his party. The local enquiry shows that the scene of the riot was on the field marked C, which had been decreed to Shunker Sing's party; and my impression is that Sooful Sing's party were the aggressors; that both parties being Rajpoots, amongst whom a word is followed by a blow, a mutual fight took place, and that in the *melte* Sooful Sing was unfortunately killed by a blow on the head. Taking this view of the case, I would mitigate the sentence passed on Shunker Sing and his party, and reduce it to one year's rigorous imprisonment. The case must go before Mr. Justice Glover.

Mr. Justice Glover.—I concur with Mr. Justice Kemp in thinking that Sooful Sing's party were the aggressors, and that the other side would have been in their legal exercise of the right of private defence of property had the affair not ended fatally. Had the harm done been anything short of death, Shunker Sing and his party would have been entitled to the benefit of Section 104 of the Penal Code.

As it is, I think the sentences proposed by my colleague quite sufficient.

The 7th December 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Convictions upon evidence in another case and without defence of prisoners.

Queen versus Bunk Behary and others.

Committed by the Deputy Magistrate of Junghypore, and tried by the Sessions Judge of Moorsheadabad, on a charge of wrongful confinement, &c.

Conviction of prisoners in two separate cases upon the evidence recorded in another case, and without taking their defence, quashed as illegal, with a direction to the Deputy Magistrate to avoid making remarks in his proceedings calculated to foster bad feelings between planter and ryot.

These cases have been referred, under the provisions of Section 434, Act XXV. of 1861, by the Sessions Judge of Moorsheadabad.

It appears that three ryots complained against Kalapane Factory servants of wrongful confinement, and causing them to execute indigo contracts. The Deputy Magistrate of Junghypore, Greesh Chunder Vidyarattni, treated the cases as separate, but he has convicted the prisoner on the evidence recorded in one case, that of Dole Gobindo, without taking their defence in the other two. There are also other irregularities in the proceedings of the Deputy Magistrate, which render it necessary that the sentences passed by him in the cases in which Ram Chunder Mundul and Hem Chunder Mundul were prosecutors should be quashed as illegal. The prisoners, whose sentences in the case of Dole Gobindo have expired, must be released.

We also think that the tone of the *roobokaree* of the Deputy Magistrate disposing of these cases is objectionable. He should be informed that, in the state of antagonism which at present exists between planter and ryot, he should avoid making remarks in his proceedings calculated to foster bad feelings. The Judge will be directed to call the attention of the Deputy Magistrate to this point.

The 7th December 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Bribe (Offer of—to Juryman).

Queen versus Bawool Chunder Biswas.

Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of abetting the acceptance by a public servant of a gratification.

Case of offering a bribe to a Juryman. Although what passed between the prisoner and the Juryman might not have amounted to an offer of a bribe to the latter, yet it was held to be so when taken in connection with what passed between the prisoner and the Juryman's brother.

The prisoner has been convicted, under Section 116 taken in connection with Section 161 of the Indian Penal Code, of having abetted the acceptance by a public servant, in this case a Juryman (Section 21, Illustration 5, Indian Penal Code), of a gratification other than legal in respect of his official duties. The sentence passed is a fine of Rs. 1,000; in default of payment, two months' rigorous imprisonment.

It appears that a relation of the prisoner was the prosecutor in a case lately tried in the Sessions Court of Zillah Nuddea. The Judge says that the finding of the Jury in that case, who acquitted the prisoner, was directly in opposition to his charge to them. Some days after that trial, the Principal Sudder Ameen of the district informed the Judge that the result might be partly attributed to the conduct of the prosecution in attempting by bribes to influence the foreman of the Jury while the case was under trial. The Judge, deeming it his duty to enquire into this matter, sent for the foreman, Keshub Nath Sookul, who informed him that the prisoner Bawool Chunder Biswas had made him an offer of money. The Judge brought the subject to the notice of the Magistrate, and the result was the committal of the prisoner to the Sessions, on the charge above recorded.

The prisoner is the dewan of Mr. Smith, an indigo planter. A relation of the prisoner, also in the employ of that gentleman, was severely maltreated by the ryots; his nose was wholly or partially cut off, a great indignity to a respectable native; and the case was sent up to the Sessions. The Jury, of whom the prosecutor in the case was the foreman, acquitted all the prisoners, although the Judge summed up for a conviction. The foreman, Keshub Nath Sookul, deposes that, while the trial was going on, the prisoner came to him, and the following conversation ensued:—

Prisoner—"The nose-cutting case is a true one; you must act so that the prisoner may be punished." *Juryman*—"Influence is unnecessary in this matter. I shall act conscientiously after seeing the evidence." *Prisoner*—"There is something in this matter.* You will go to Cutcherry after seeing your eldest brother Dwarkanath Sookul." *Jury-*

man—"This is very wrong; you ought not to address such words to a respectable man." *Prisoner*—"I can spend as far as 1,000 rupees in this matter."

Dwarkanath Sookul deposes that the following conversation took place between him and the prisoner:—*Prisoner*—"Your brother is a Juryman in the nose-cutting case; you know this?" *Dwarkanath*—"No, I do not." The prisoner then offered the rupees, some notes, and said: "Give these to your brother, and speak to your brother, so that the prisoners may be punished." Two bank-notes, one of 100 rupees, and one of 20, were offered to the witness, but the witness refused to take them.

The pleader for the prisoner contends that the evidence is not trustworthy; and that, even admitting its credibility, there is no legal proof of any offer of a gratification to the Juryman, Keshub Nath Sookul.

We have carefully considered this case, and are of opinion that, although what passed between the prisoner and Keshub Nath Sookul taken alone might not have amounted to an offer of a bribe to the latter, it does so when taken in conjunction with what passed between the prisoner and the witness Dwarkanath Sookul. The prisoner told the Juryman not to go to kutcherry without first seeing his brother Dwarkanath Sookul, to whom the prisoner had already tendered money; and further avers that he would spend as much as 1,000 rupees in the matter. We therefore think that prisoner intended the Juryman to be under the impression that the prisoner would give him a gratification to the extent of 1,000 rupees, if he would consent to give a verdict convicting the prisoner in the case in which the relation of the prisoner was the prosecutor.

We confirm the conviction and sentence, and reject the appeal.

* This is a literal translation—the true meaning is there is something to be had in this matter.

The 9th December 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Amendment of charge—Subjects of Independent States—Culpable Homicide—Kidnapping.

Queen versus Dhurmonarain Moitro, Haradhun Bhutto, Alina Doss, and Bhoysing Doss.

Committed by the Deputy Magistrate of Fulpigoree, and tried by the Sessions Judge of e, on a charge of abduction, &c.

A Judge can alter or amend a charge at any stage of the trial.

The subject of an Independent State, though not amenable to the British Courts on a charge of culpable homicide committed out of British territories, may be so amenable on a charge of kidnapping from those territories.

Mr. Justice Glover.—This is a very painful case, and one that speaks most unfavorably for the administration of justice in the sub-division of Titalya. An elderly man of respectable status in society and good character is carried off in the face of day, detained and maltreated in the Cooch Behar Territory, and his dead body finally tossed out on the road, without the slightest attempt at real interference on the part of the authorities.

The conduct of the Deputy Magistrate of Titalya calls for the marked disapprobation of this Court. Had this officer done his duty in the first instance, a man's life would have been saved; had he done it at any time, there would have been direct evidence on which to convict his murderers. The Sub-Inspector of Police at the Bada Thannah also greatly neglected his duty in not at once carrying out the Deputy Magistrate's orders when they were at last given.

The Court remarks, moreover, that the charge originally made by the Deputy Magistrate was altogether inconsistent with that officer's own estimate of the prisoners' guilt. He considered them guilty of having caused Lukeenarain's death, and yet committed them on a charge of kidnapping only.

The prisoners' vakeel took two *in limine* objections. The first was that the Judge had no power to amend the calendar or introduce new charges after the trial had commenced. The second, that as the crime of which the

prisoners Dhurmonarain and Alina had been convicted was committed within the independent territory of Cooch Behar, they could only be tried for it by the Cooch Behar authorities.

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With regard to the first objection, Section 244 of the Code of Criminal Procedure lays down that it shall be competent to any Court before which a trial is held, at any stage of the trial, to alter or amend the charge. This is what the Sessions Judge has done in the present instance, exercising the discretionary power given him by Section 245, and distinctly stating that the prisoners were in no way prejudiced in their defence by the alteration.

On the second point, it appears from a return made by the Sessions Judge, in reply to an order of this Court, that two of the prisoners, Dhurmonarain and Haradhun, are subjects of the Queen, their domiciles are in the districts of Rajshahye and Bogra respectively, and they themselves are only temporary residents in the State of Cooch Behar.

The third prisoner Alina is a subject of Cooch Behar, and, so far as the actual homicide of Lukeenarain is considered, is not amenable to the Rungpore Courts.

The domicile of the fourth prisoner Bhoysing is not stated, but as he has been convicted of the "kidnapping" only, the omission is of no importance.

The evidence against the prisoners *quoad* the "kidnapping" is the deposition of the deceased's nephew Bhoobun, and of witness No. 3, Radhaneshyo, corroborated to a certain extent by that of the deceased's wife Rajeshurree. These witnesses (Bhoobun and Radha) swear that the deceased was carried off from the bunder by the prisoners and a number of other men to Cooch Behar—the cause of the outrage being a "jote" belonging to Lukeenarain, which the Cooch Behar authorities wanted him to relinquish, but which he steadfastly refused to give up. The fact of the abduction is further corroborated by the witness Bhoobun's petition to the Deputy Magistrate, presented immediately after the occurrence, in which both the carrying off and the reasons for it are detailed. Had the Deputy Magistrate acted on this petition, his present trial would, in all probability, have never been held.

Vol. I. That Lukeenarain was confined in the Dootia kutcherry in the Province of Cooch Behar, and for the purpose above stated, is proved by the evidence, as is also that he was beaten by the prisoner Dhurmonarain whilst there; and three other witnesses depose that they afterwards saw the deceased lying in the kutcherry malkhana covered with a cloth and with a heavy stone on his chest, whilst the prisoners Dhurmo and Alina were standing by.

I concur with the Sessions Judge in his estimate of the evidence for the defence; it is evidently tutored, and is moreover opposed to proved facts.

The conviction of the prisoner Dhurmo should, I think, have been on "violent presumption," full legal proof being wanting. With this reservation I confirm the Sessions Judge's sentence upon him. The employes of Independent Cooch Behar are, as I know from personal experience, lawless and violent to a degree, and a severe sentence is called for.

I also reject the appeals of prisoners Nos. 7 and 9, Haradhun and Bhoysing.

With regard to the prisoner Alina, the only charge sustainable against him is the kidnapping (Section 363), and on this I convict him, sentencing him to the same punishments as the prisoners Nos. 7 and 9—viz., 7 years' imprisonment in transportation.

The case must go before Mr. Justice Kemp with reference to the last-named prisoner, whose conviction of culpable homicide, under Section 304, I have quashed as illegal.

Mr. Justice Kemp.—I concur.

The 9th December 1864.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Amendment of charge (after finding and discharge of the Assessors).

Queen versus Dyee Bhola.

Committed by the Officiating Magistrate of Balasore, and tried by the Sessions Judge of Cuttack, on a charge of murder, &c.

Case of murder. After the finding and discharge of the Assessors, the Judge altered the charge to culpable homicide not amounting to murder, and convicted the accused on that charge. **Held** that the conviction was illegal.

Mr. Justice Glover.—I think that this conviction was irregular. By Section 244 of the Criminal Procedure Code, the Sessions

Judge might have altered the charge to culpable homicide not amounting to murder, (Section 304) at any stage of the trial. But in this case the finding of the assessors was recorded, and the assessors themselves discharged before the Sessions Judge thought of amending the charge. The trial was over, and the prisoner acquitted; and before he could be punished for the crime of which the Sessions Judge has now convicted him, he must have been committed.

Had, however, the evidence, on which the conviction rests, been such as to prove his guilt, I would not have been inclined to interfere, the prisoner not having been prejudiced, and substantial justice having been done. But I am not satisfied with the evidence, and think that the prisoner must be acquitted.

The proof against the prisoner consists of the depositions of the women of his family. The prosecutor himself (prisoner's brother) was away at the time, and knows nothing of these women. One prisoner's sister states that the prisoner and his father abused the deceased because she had cooked the dinner badly. Witness then went out to her work, and, when she returned, found the body of the sister-in-law hanging to a beam of the house. She saw no beating. The second, the daughter of the prisoner, was not examined on oath. She states that the prisoner's father struck the deceased with a stick, on which she went and hanged herself.

The Sessions Judge has expressed an opinion that this girl's evidence is altogether untrustworthy.

The third, who is the prisoner's wife, and as such should not have been examined, tells the same story. The Judge discredits her testimony likewise.

The indirect evidence is that of two men, who state that they heard prisoner and his father say that they had killed the deceased; this, as the Judge admits, is no evidence against the prisoner; and of witnesses Nos. 7, 8, and 9, who depose that they heard a noise in the prisoner's house, and were told by the prisoner's father that the women were squabbling inside.

There was no *post mortem* examination, the body being too far decomposed to admit of it.

The Sessions Judge comes to the conclusion that the prisoner killed his sister-in-law, because there was no one else who could have done it.

In my opinion, there is no evidence that the woman died from beating at all. Taking

he recorded evidence at its utmost value, 't merely supports a charge of assault, whilst the sooruthal papers show that the deceased's neck was broken—a natural enough result of hanging. It is by no means uncommon for women of this class to commit suicide when hwarded or abused by their relatives; in Upper India it ordinarily takes the form of throwing themselves down wells; in Bengal, of hanging. I have known of more than one instance of each kind, and I think this the most reasonable explanation of the woman's death.

Anyhow, there is no evidence to connect 't with the beating inflicted by the prisoner, even if it be considered proved that he did beat her, and I think the man entitled to an acquittal.

The case must go before my colleague, Mr. Justice Kemp.

Mr. Justice Kemp.—I entirely concur in the remarks of my learned colleague. I would even go further. The conviction, in my opinion, was more than irregular; it was illegal. It is true that Section 439 of the Code of Criminal Procedure enacts that no trial or judgment shall be set aside on appeal for any irregularity unless there has been a failure of justice. Now, in the present instance, we have the case of a prisoner acquitted of the charge upon which he was arraigned, a finding of the assessors recorded—in short, a complete trial. Suddenly the Judge finds that there is evidence in his opinion to convict on a charge of culpable homicide not amounting to murder. The assessors are recalled; the prisoner, an ignorant native, quite unconscious of what is going on in Court, makes no objection, or is supposed to make none; and he is convicted of an offence with which he was not charged, and respecting which he had no opportunity of cross-examining the witnesses for the prosecution, who were not even re-examined. I think that this is a substantial failure of justice.

I have read the evidence of which my learned colleague has given a careful and correct analysis, and I have no hesitation in saying that, even if the prisoner had been tried in a legal form, I should have acquitted him on the evidence as it stands.

The prisoner must be released.

The 13th December 1864.

Present:

The Hon'ble F. B. Kemp, *Puisne Judge.*

Jury (Unanimity of).

Queen versus Ujjoon Biswas and another.

Committed by the Deputy Magistrate of Baripore, and tried by the Sessions Judge of the 24 Pargunnahs, on a charge of attempt to murder, &c.

When a Jury are not unanimous, the Judge is not bound to summon a new Jury.

This case was tried with a Jury. The prisoners were arraigned on two charges—1st, with attempt to commit murder; and, 2nd, voluntarily causing grievous hurt. The Jury acquitted them of the graver charge, and convicted them of the lesser. The sentences are not too severe, taking all the circumstances of the case into consideration.

The pleader for the appellants urges that, as the Jury were not unanimous, the Judge ought to have summoned another Jury. This objection is clearly unavailing. The Jury consisted of seven persons, and six of them found the prisoners guilty (see Section 328, Code of Criminal Procedure).

The pleader then urges that there has been a misdirection to the Jury, but, on reading the charge, I can find none. Everything was left to the unfettered judgment of the Jury. The Judge summed up the evidence most fairly and carefully, and the verdict of the Jury appears to me fully borne out by the evidence. I reject the appeal.

The 14th December 1864.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Section 83, Penal Code—Capacity of a child to do wrong (how to be measured).

Queen versus Mussamut Aimona.

Committed by the Officiating Magistrate of Furrerdpoore, and tried by the Sessions Judge of Dacca, on a charge of murder.

In construing Section 83 of the Penal Code, the capacity of doing that which is wrong is not so much to be measured by years, as by the strength of the offender's understanding and judgment. The circumstances of a case may disclose such a degree of malice as to justify the application of the maxim *malitia supplet aetatem*.

The prisoner has been convicted of the murder of her husband. The Sessions Judge of Dacca has not passed sentence on the prisoner, but has submitted the record of the trial for the order of this Court, remarking "that, as the prisoner is a mere child, it appeared to him to be out of the question to pass the only sentence which the law admits of for the crime of murder—*viz.*, death or transportation for life."

This is a very painful case. The medical officer deposes that the girl is about 10 years old. The mother-in-law of the prisoner deposes that the prisoner had been married six years to her deceased son, and that her age is 13 years. The same witness, however, admits that the marriage has not been consummated. We therefore think it safer to assume that the age of the prisoner is about 10 years, as estimated by the medical officer.

The facts of the case are briefly as follows: The night before the murder, the prisoner slept with her mother-in-law. Her husband, the deceased, a healthy, strong young man, aged 19 or 20, slept with his brother in another hut in the same homestead. In the morning early, the mother-in-law woke up the prisoner, and told her to go about her household duties. The prisoner went out of the house. Shortly after this, the mother-in-law heard her son, the witness Afazuddi,

crying out, "Sister-in-law, what have you done?" The mother-in-law immediately came out of the house, and saw the prisoner running out of the southern house northwards. Her deceased son Infanoola then staggered out of the southern house, crying "Father! mother!" and fell down in the courtyard. The witness observed a wound on the right side of his neck, from which blood was pouring. The son never spoke, and died shortly afterwards. The prisoner hid herself in a "pat" field, and, though searched for, was not found until the afternoon, when she was brought home by her maternal uncle.

The principal witness Afazuddi, aged about 17 years, brother of the deceased, deposes—"I went early in the morning to an outer house of the homestead with a *hooka* for my father, the witness Pheloo. As I returned within the *baree*, I went to the door of the southern house, and saw the prisoner strike my brother Infanoola with the *sen dao* (a sharp cutting instrument produced in Court) on the neck. The prisoner then threw down the weapon, and ran away towards the north into a 'pat' field. My brother was asleep when the prisoner struck him. My brother, after receiving the blow, rushed out into the courtyard, screaming out, 'Father! mother!' He fell down, remained speechless, and died after a short interval. Ten or twelve days before the crime, the prisoner committed some act of mischief in breaking a bamboo. My father abused her, and my deceased brother threw a small stick at her."

The witness thinks that this was the motive for the murder. The neighbours came up, and saw the deceased lying in the courtyard, wounded and dying.

The medical officer deposes that there was an incised wound 2 inches long, $\frac{3}{4}$ inch broad, and from $\frac{1}{4}$ to 1 inch deep on the neck. The wound was deeper below than on the surface—it swept down by the side of the larynx, and cut through the sheath of the internal jugular vein and the common carotid artery. Death was caused by this wound. The wound could have been inflicted by such force as a girl of the prisoner's age could easily use.

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We are of opinion that the acts of the prisoner—*viz.*, the time selected, "when her husband was asleep," the weapon used, "a sharp cutting dao," the place in which she struck him, "the neck"—are, each and all, inconsistent with any other hypothesis than that her intention was to kill her husband. Her subsequent flight and concealment evince a consciousness that she had committed a crime. Her defence is a simple denial. She accounts for leaving the homestead by saying that some of her male relations, before whom she was not in the habit of appearing, came into the courtyard, and she there hid herself behind the house. She does not, however, explain why she left the house at all, or why she remained concealed in the "pat" field till the afternoon, nor it is probable that a girl of her age and humble station in life should be a "pu dah mshern." The defence shows considerable ingenuity, but is altogether improbable.

We have now to consider whether the prisoner has attained to use the language of the Penal Code, Section 83: "sufficient maturity of understanding to judge of the nature and consequences of her conduct," for, if not, she has committed no offence. Her age is between that period which would protect her altogether under the provisions of Section 82, and the period (that dubious stage) which renders her answerable for her acts, provided she was conscious of their nature and consequences. It must be remembered that the capacity of doing that which is wrong is not so much to be measured by years as by the strength of the prisoner's understanding and judgment. One girl of ten may have as much cunning as another of twelve, and in this country girls are very precocious. The Judge tells us that the demeanour of the prisoner during the trial showed great intelligence, and that

she was fully alive to the responsibility of her position. Her very defence appears to us to show ingenuity and presence of mind. The medical officer, a native gentleman, Doctor Bholanath Bose, M.D., to a question put to him by the Judge as to "whether the prisoner had sufficient intelligence to know the nature of the wound she was inflicting," answered—"Yes, I think any one who could choose such a situation as the neck, and such an instrument as the *sen dao*, to inflict a wound, must have known that the wound would be a deadly one."

We, therefore, are of opinion that the prisoner was *doli capax*, and that there is sufficient reason, from the evidence and circumstances of the case, to infer such a degree of malice as to justify our applying the maxim of *malitia supplet aetatem*.

Convicting, therefore, the prisoner of murder—and we can convict her of no other offence—the only sentence the Court can legally pass is one of death or transportation for life. But, taking into consideration the age of the prisoner, we pass the lighter sentence of the two—*viz.*, transportation for life. At the same time, as we think that this is a case in which the Lieutenant-Governor will do well to exercise the prerogative vested in him of tempering justice with mercy, we direct that this report be submitted to His Honor with our earnest recommendation that, under the provisions of Section 54 of the Code of Criminal Procedure, he will be pleased to remit the punishment in part to a sentence of seven years' imprisonment in a reformatory, if such an institution exists; failing such, in any jail to be selected by His Honor, with labor suited to the age and sex of the prisoner.

The 16th December 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,

Puisne Judges.

Abduction—Enticing—Abetment.

Queen versus Srimotee Poddee and others.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of abduction, &c.

The conviction of a procuress changed from abduction to enticing, the woman alleged to have been abducted having been of mature age and a free agent.

The conviction of the other prisoners also changed from abetting wrongful concealment under Section 368 of the Penal Code to abetment under Section 116.

Mr. Justice Glover. This conviction cannot, I think, be sustained.

The prisoner Srimotee Poddee has been convicted under Section 366 of the Indian Penal Code, and sentenced to 7 years' rigorous imprisonment.

Now, the woman alleged to have been abducted was 20 years old; had been married several years; did not care for her husband (who, as she says in her deposition, used to beat her), and was perfectly willing to exchange her life of drudgery and hard living for that of a Calcutta prostitute, whereby she expected to get good food, clothes, and money. All this is derived from her own statement to the Sessions Judge. Section 366 makes use of the words "compelled, or knowing it likely that she will be compelled;" and again, "forced or seduced to illicit intercourse."

Now, it is quite clear that the woman was not compelled to go to Calcutta; she went, or rather attempted to go, there of her own free will; she was certainly neither forced nor seduced to illicit intercourse; she had made her deliberate choice; she was a woman of mature age, so far as such a subject was concerned, and was determined of her own free will to leave her husband, and become a prostitute in Calcutta; she started from her house with that intention; and such a woman can hardly be said to have been seduced, as it is quite evident that she was too ready to take to bad courses without pressing.

I would therefore acquit Mussamut Srimotee Poddee on the charge of abduction under Section 366. **Vol. I.**

But there is quite sufficient evidence to convict her of "enticing" under Section 498; for, whatever the woman Kishoree's secret inclinations were, she would have had no opportunity of carrying them out had not Poddee interfered, and would no doubt, but for that old procuress, have remained quietly, if not contentedly, in her husband's house.

I would sentence Srimotee Poddee to the full punishment allowed under the Section—viz., two years' rigorous imprisonment.

The other prisoners must also be acquitted of the charge of abetting the wrongful concealment under Section 368, because there was no wrongful concealment practised, the woman having been, as I think, a free agent throughout, and her confinement in the prisoner Poddee's house being the result of her own wish, and in furtherance of her own plan for getting to Calcutta without the husband's knowledge.

But there is no reason why they should not be convicted under Section 116; and in accordance with the provisions of that Section I would sentence them each to six months' rigorous imprisonment.

Mr. Justice Kemp.—I concur in this view of the case. The offence of which the procuress Poddee has been convicted is a very serious one to native society, and I have no hesitation in expressing my concurrence with the sentence proposed by my learned colleague. The other prisoners are clearly guilty of aiding and abetting the offence committed by Poddee, and I approve of the proposed sentence.

The 19th December 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Recognizances (Taking of—without conviction of rioting).

Queen versus Seetaram Hazra and others.

Committed by the Deputy Magistrate of Boodhood, and tried by the Sessions Judge of West Burdwan, on a charge of rioting, &c.

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It is not necessary that there should be a conviction of rioting in order to admit of a Magistrate taking recognizances to keep the peace.

The order of the Deputy Magistrate appears to us perfectly legal.

It is not necessary that there should be a conviction of rioting in order to admit of a Magistrate taking recognizances to keep the peace. Section 282, Code of Criminal Procedure, lays down that, in cases where the Magistrate shall receive credible information, &c., he shall call on them to show cause why they should not be required to enter into a bond to keep the peace. This is precisely what the Deputy Magistrate did. He went himself to the spot, and satisfied himself, both by general inspection and by evidence. He then called upon the parties implicated to show cause, and, on their not being able to do so, ordered them to enter into recognizances. We observe also that the appeal to the Judge was not on the ground that they had not been duly summoned, but that the evidence of their intention to commit a breach of the peace was insufficient.

This order was correct, and the Sessions Judge's reference unnecessary.

veigled into the house for the purpose. The only witness who deposes to this fact is the prisoner's own wife, who, in such a matter, is not a legally qualified witness, and ought not to have been examined. The other witness, again, only deposes to the prisoner's uttering threats against the deceased, which, under the circumstances, was not unnatural.

We observe that these two witnesses were originally themselves charged with the crime, though afterwards admitted as Queen's evidence.

But, although we consider the "inveiglement" not proved, there is ample evidence in the prisoner's own confession to convict him of murder. The nature of the weapon employed, a heavy stone pestle, the injuries inflicted, and the subsequent throwing of the body into a neighbouring khal, prove this; whilst his averment that he did not know whom he was beating is opposed to all the circumstances of the case.

But, considering the immediate provocation and the prisoner's outrageous feelings at seeing a man actually intriguing with his wife, we think that a capital sentence is not necessary for the ends of justice. We therefore sentence the prisoner Sheik Bhekye to transportation for life.

The 19th December 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Capital sentence—Murder—Provocation.

Queen versus Bhekye, alias Sheik Anser.

Committed by the Magistrate, and tried by the Sessions Judge of Sylhet, on a charge of murder.

A capital sentence mitigated in the case of murder committed while under the influence of provocation caused by an intrigue with the wife of the prisoner.

That the prisoner killed the deceased, there can be no question. He admitted the fact to the Magistrate, and confirmed it at the Sessions; and that he intended so to kill him is, we think, quite clear. But there is no evidence that the deceased was in-

The 21st December 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Criminal Trespass.

Queen versus Jeenut Bebee, &c.

Committed by the Magistrate, and tried by the Officiating Judge of Cuttack, on a charge of criminal trespass.

The entry by one man on another's property, accompanied by the cutting down of trees in that property, is criminal trespass.

We can find no illegality in the proceedings of the Deputy Magistrate. The possession was held to be with the plaintiff. The entry by the defendant on the property, accompanied with the cutting down of the trees in the property, constitutes the offence of criminal trespass. The papers are returned to the Judge.

The 31st December 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Affray with Homicide (under Regulation VI., 1828).

Queen versus Kamaruddy Bhooya.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of affray and homicide.

A sentence of rigorous imprisonment passed in a case of affray with homicide, under Regulation VI. of 1828, quashed as illegal, and altered to one of imprisonment with labor.

Mr. Justice Glover.—The punishment to which the prisoner in this case has been sentenced appears to be illegal. There is no distinct finding in the judgment on the question of premeditation; but from the tenor of the Sessions Judge's remarks, and from his acceptance of the facts of the case as detailed by his predecessor, before whom the original trial (the present case is a supplementary one only) was held, there can, I think, be no doubt that he did consider the affray in which the homicide occurred to have been remediated.

Now, the offence was committed whilst the old law (Regulation VI. of 1828) was in force, and this Regulation enacts that cases of remediated affray with homicide, under Regulation II. of 1828, shall be visited with a minimum punishment of five years' imprisonment with or without labor, with corporal punishment commutable to a further term of imprisonment under Regulation II. of 1834.

The Sessions Judge's order therefore of one year's rigorous imprisonment, passed as it was under the old law, is illegal, and should be quashed.

Under Section 405 of the Criminal Procedure Code, this Court has, in cases like the present, power either to direct a new trial, or to pass such sentence as it shall deem right.

To order a new trial would be to cause unnecessary delay, and I would pass sentence at once—the sentence provided by law—*viz.*, five years' imprisonment with labor.

The case must go before my colleague Mr. Justice Kemp.

Mr. Justice Kemp.—I concur.

The 31st December 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Commitment (by a Collector).

Queen versus Bunsee Sing.

Committed by the Collector, and tried by the Sessions Judge of Behar, on a charge of false evidence.

A Collector, trying a suit under Act X. of 1859, has authority to commit to the Sessions Judge.

The appellant in this case was defended by Counsel, who urged in his favor (1) that the Collector, before whom the alleged perjury took place, had no authority to commit, and (2) that the evidence was insufficient and unsatisfactory.

We are clearly of opinion that the Collector had jurisdiction. The alleged perjury took place during the trial of a suit under Act X. of 1859, and Section 19 of the Indian Penal Code (Illustration a) lays down that a Collector, trying a suit under Act X. of 1859, is a Judge. His Court therefore *quoad* this case was a Court of Civil Judicature, and he had power, under Section 173 of the Criminal Procedure Code, either to send the case to the Magistrate for commitment to the Sessions Judge, or to commit himself.

With regard to the 2nd objection, we see no reason to interfere with the Sessions Judge's decision. It is very clearly proved, by the testimony of many respectable witnesses, that the prisoner did sign his name to the documents he afterwards repudiated. His object in doing so was to defraud.

There might, we observe, have been a conviction on the 9th count also, as the kistbun-dee referred to therein was not only signed by the prisoner, but was also registered by him; the fact being proved by the evidence of those present at the time and by the endorsement of the registry office on the back of the deed.

As a last resource, appellant's vakeel puts in a plea *ad misericordiam*, praying for some diminution of the punishment; but we think that, under the circumstances of the case, a sentence of five years' rigorous imprisonment is by no means too heavy.

We reject the appeal, and confirm the orders of the Sessions Judge.

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The 21st December 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Dacoity—Knowingly having in possession property stolen in dacoity.

Queen versus Abool Hossein and 11 others.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of dacoity, &c.

When stolen property is found in the possession of dacoits, the offence of "knowingly having in possession" is to be considered as included in the original one of dacoity, unless there are circumstances clearly separating the one crime from the other—e. g., length of time, or distance.

Mr. Justice Glover.—This is a case which, under the old law, would have been one of "assault and plunder;" but the only Section of the Penal Code under which it can come is Section 391, and the prisoners were therefore charged with "dacoity."

The evidence of a large number of witnesses proves that the prisoners, who were the manjee and mullars of a guard-boat, boarded a merchant-boat, against which they had either accidentally or by design struck, beat the rowers, and plundered their property. Their excuse was that the collision was brought about by the merchant-boatmen's carelessness, and that the sail of the guard boat had been torn. The plundered boatmen went off to the police station, which was not more than a mile distant, and complained to the Inspector. The guard-boat shortly after made its appearance, going down stream, and after some difficulty the boatmen were made to bring to. On searching the vessel, sundry cloth and other articles of property were found, which were sworn to by the merchant-boatmen as those which the crew of the other vessel had taken from them. These witnesses also identified all the prisoners as the men who had boarded their boat, and carried off their property. In their defence the prisoners state that the collision was the fault of the merchant-boatmen, and denied that they either assaulted the mullars or plundered their property. None of them called witnesses, or rather they refused to examine them after they were summoned.

I see no reason to interfere with the conviction on the 1st count. The attack and plunder is satisfactorily proved by the evidence of a great number of witnesses, and the evidence of the Police Inspector and of his constables proves that the stolen articles

were found in the guard-boat when it was forced to bring to.

I confirm, therefore, the sentence of two years' rigorous imprisonment imposed by the Sessions Judge, and reject the appeal.

But the prisoners cannot be convicted on the 3rd count (Section 412) likewise. It has been frequently ruled by this Court that, when stolen property is found in the possession of dacoits, the offence of "knowingly having in possession" is to be considered as included in the original one of dacoity, unless there are circumstances which clearly separate the one crime from the other—length of time, or distance, for example. In this case, the dacoits were taken red-handed within an hour of the plundering.

I would therefore quash so much of the Sessions Judge's order as sentences the prisoners to an additional year's rigorous imprisonment on the third count of the charge.

On this point the case must be submitted to my colleague Mr. Justice Kemp.

Mr. Justice Kemp.—I entirely concur.

The 22nd December 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Murder—Capital sentence (Commutation of).

Queen versus Baboo Lall Jhah.

Committed by the Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of murder.

Though the evidence was held to be sufficient to convict the accused of murder, yet, as the evidence gave rise to doubts as to the precise part taken by the prisoner, it was thought safer to remit the capital sentence, and pass one of transportation for life.

The investigation of this case has been very carelessly conducted by the Magistrate; and evidence which would have afforded most satisfactory corroboration in many points has been either neglected or altogether omitted. The Magistrate's reply to a reference from this Court shows that neither the kodai nor the earthen-pot, said to have been covered with blood-marks, were subjected to medical examination; whilst the pieces of human flesh found in the place where the murder is said to have been committed were allowed to remain in the hands of the police, and were never produced at the trial at all.

The case against the prisoner is the evidence of the woman Aladee. She was originally, with another woman named Sahajun (likewise convicted in this case, but who has not appealed), accused of the murder, but was afterwards permitted to turn Queen's evidence. Sahajun testified against Baboo Lall before the Magistrate, but at the Sessions retracted her evidence, so that of direct proof against the prisoner there remains but the deposition of Aladee.

Now, the evidence of this one witness would, in accordance with many rulings on the subject, be sufficient, if there be no reason to doubt its credibility; but, had it stood entirely alone, we should have hesitated to convict upon it. There are, no doubt, discrepancies in it, notably as to the place where the murder is said to have been committed. Aladee, before the Magistrate, declared it to have taken place in Sahajun's cooking hut, whilst at the Sessions she describes the place as a cow-house.

But, although this be the only direct evidence implicating Baboo Lall as one at least of the murderers, there is a considerable amount of corroborative proof of the woman's statement that the deceased was murdered in Baboo Lall's premises. No witnesses depose to the fact that, on the night of the occurrence, the deceased was sent for by the two women above mentioned; they waited outside the house, and, on deceased coming out, took him away with them (it should be mentioned here that the deceased appears to have intrigued with one, if not both, of these women). Aladee states that, before he accompanied them, he went back, and left his turban behind—a point corroborated by the evidence of the deceased's father, who states that, on enquiry for his son next day, he supposed that he had gone to bathe, because he had left his turban in the house.

Again, the police who searched the cow-house found marks of blood on the ground (those marks are said to have been sprinkled over with ashes), and a small piece or pieces of flesh, which the Inspector thought were part of a human finger. The relics, however, were not sent in (why, it is difficult to understand), so that the value of this evidence is entirely nullified. On searching the prisoner's house, a kodai was discovered hidden between the kotree and the wall: and on it, as deposed to by the witnesses who were present, were spots which they believed to be blood and one or two human hairs; these are said to have been still on the kodai when it was sent in to the Magistrate.

Again, there is the evidence of the Deputy Inspector of Police, who states that the woman Aladee showed him an earthen pot covered with, what she stated, and what the Deputy Inspector believed to be, blood-marks, and likewise the mark of a bloody hand on the wall of the hut where the murder is said to have been committed. Mr. Howard made no enquiry, which is to be regretted, but brought the pot with him to the station. He does not seem to have handed it over to the Magistrate, or to have taken steps to ascertain whether the marks were blood-marks or not.

It may, however, we think, be considered proved that the deceased went away with the two women, Aladee and Sahajun, to the house of one of the prisoner's; that he was never again seen alive; that his body was found afterwards in a neighbouring river, with a tremendous cut on the neck and skull; that the appearances in the hut were such as to show that somebody had been killed there; and that the weapon used in the murder was the kodai found in Baboo Lall's house.

That the prisoner had ill-feeling towards the deceased is proved, and, under the circumstances, the feeling was a natural one enough.

Taking all this together, we think that it affords sufficient corroborative evidence to make us receive Aladee's testimony as true; and, if that be so, it is sufficient to convict the prisoner of murder.

But as from this evidence there arises some doubt in our minds as to the precise part taken by the prisoner, we think it safer to remit the capital sentence, and pass one of transportation for life.

The 26th December 1864.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Murder—Principals and Abettors.

Queen *versus* Jan Mahomed and Kamoo
Gazee.

*Committed by the Magistrate, and tried by the
Sessions Judge of Tipperah, on a charge of
murder, &c.*

When two persons take an active part in a murder, they become principals in the first degree, though one of them only may have been the actual killer. If

Vol. I. one stood by whilst the crime was being committed, he would be an abettor.

Mr. Justice Glover.—The Sessions Judge convicted these two prisoners of "abetment of murder," and has sentenced them each to ten years' transportation. This finding is not in my opinion legal. It is held to be proved that both of them struck the deceased; at least that is the only meaning I can attach to the words of the judgment—"The witnesses differ as to which of them first struck the deceased; that one of them did so strike him, is beyond doubt; that both were actively engaged, I find proved." The Judge probably means that, although both the prisoners struck Mahomed Ali, he is not quite certain as to which of them struck that particular blow of which the deceased died.

This being so, the prisoners were guilty, not of abetment of "murder," which supposes them to have instigated or aided the commission of the offence otherwise than by actually striking the fatal blows, but of the murder itself. If one had stood by whilst the crime was being committed by the other, he would have been an abettor; but, when both take an active part, they become principals in the first degree, though one of them only may have been the actual killer.

The assault was committed with heavy 6 feet lattes, and one blow on the head fractured the skull. Whatever dispute there may have been between the parties, it is clear that, at the time the deceased was struck, the prisoners had had the opportunity of cooling down. There was no such want of self-control as to bring the case under the Exceptions to Section 300 of the Penal Code, and the injuries were inflicted with at least the knowledge that they were likely to cause death.

But this Court, although under Section 419 of the Code of Criminal Procedure it has the power of reversing or altering findings and sentences, cannot enhance any punishment that may have been awarded; so that, although it could alter the conviction of "abetment of murder" to that of "murder" itself (the prisoners having pleaded to that charge), it could not inflict either of the only two punishments provided by law for the crime.

I think, therefore, that the finding and sentence of the Sessions Judge should be quashed, and that he should be directed to record a legal finding on the evidence, and to pass the sentence provided by the Penal Code.

The papers must go before my colleague Mr. Justice Kemp.

Mr. Justice Kemp.—The prisoners, if guilty of any offence, are clearly guilty of murder, and not abetment of that offence. I therefore concur in quashing the conviction and sentence, and directing the Judge to record a legal finding, and pass the sentence prescribed by the law.

The 30th December 1864.

Present :

The Hon'ble F. A. Glover, *Puisne Judge.*

Murder—Culpable homicide not amounting to murder—Jury (Finding of).

Queen versus Uckoor Ghose.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Moorshedabad, on a charge of murder, &c.

The finding of a Jury that, although the accused killed the deceased, the crime was not murder, not because it fell under any of the exceptions allowed by law, but because the accused had no object in killing him, is not a legal finding, and does not amount to a conviction of culpable homicide not amounting to murder.

The prisoner Uckoor Ghose has been convicted of murder under Section 303 of the Penal Code, and sentenced to transportation for life.

He urges, in appeal to this Court, that the first verdict of the Jury was intended to be one of "culpable homicide not amounting to murder;" that the Sessions Judge was bound to receive and act upon it, and had no power to order the Jury to reconsider their finding. If this point be made out, it is of course fatal to the conviction.

I have gone carefully over the record, and find that the Judge, in his charge to the Jury, made special mention of the exception (No. 4, Section 300, Indian Penal Code) on which the prisoner's vakeel relied, and left it to the Jury to decide whether or not the prisoner was entitled to the benefit of it.

Their verdict was—"We have no doubt that the prisoner killed Nuddee Ghose. We think Nuddee Ghose gave him no provocation, but we do not think it murder, because the prisoner had no object in killing him."

This was clearly not such a verdict as could have been received. The Jury were not entitled to pronounce what was the law, or to give their own definition of what constituted "murder." Their duty was to judge

the facts of the case as detailed in the evidence, and to say whether Exception 4 of Section 300 of the Penal Code applied, and, if so, to find the prisoner guilty of the lesser crime only.

In my opinion they disposed of this question adversely to the prisoner (indeed, if they believed the evidence, they could hardly have relied upon it for a moment), and found that, although Uckoor Ghose killed Nuddee Ghose, the crime was not murder, not because it fell under any of the exceptions allowed by law, but because the prisoner had no object in killing him.

This was not a legal finding, and the Jury were properly directed to reconsider their verdict, with reference to the exception already brought to their notice. On their return to the Court, they brought in a verdict of "guilty."

Taking all the circumstances into consideration, I think that the first verdict was not one that could legally be received as convicting of culpable homicide not amounting to murder, and that there is (no other point of law being raised) no ground for disturbing the second finding of "guilty."

The appeal is rejected.

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RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

Vol. II.

The 2nd January 1865.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,

Puisne Judges.

**Substitution of Transportation for imprisonment
— Robbery — Voluntarily causing Hurt.**

Queen versus Mootkee Kora.

*Committed by the Joint Magistrate, and tried by
the Sessions Judge of Midnapore, on a charge
of highway robbery, &c.*

To bring Section 59 of the Penal Code into operation, the punishment awarded on one offence alone must be seven years' imprisonment, and cannot be made up by adding two sentences together, and then commuting the amalgamated period to transportation.

The two offences of robbery and of voluntarily causing hurt, when combined, are punishable under Section 394 alone, and not under Sections 392 and 394.

Mr. Justice Glover.—The prisoner in this case has been convicted of highway robbery under Section 392 of the Penal Code, and of voluntarily causing hurt, &c., under Section 394, and has been sentenced to three years' transportation, with a fine of Rs. 50 for the first, and to seven years' transportation for the second offence. Before considering the evidence, I remark that the first sentence of three years' transportation passed under Sections 392 and 59 of the Penal Code is illegal; under the latter section a sentence of transportation cannot be less than seven years, and it has been frequently ruled by this Court that, to bring Section 59 into operation, the punishment awarded on one offence alone must be seven years' imprisonment, and cannot be made up by adding two sentences together, and then commuting the amalgamated period to transportation.

I observe also that Section 394, in itself, provides for the offence of which the prisoner has been found guilty. That section refers to "causing hurt whilst committing or attempting to commit robbery," and the amount of punishment that can be awarded—*vis.*, transportation for life—shows that the Section includes the robbery, as well as the hurt; and that, when the two offences are combined, a fresh conviction under Section

For the rest I have gone very carefully, and more than once, over the whole of the evidence recorded by the Sessions Judge, and, although there are some points—Haradhun's state when he left the grogshop, and when found the next morning by Seedeshur Moito (a witness not forthcoming) for example—which could have been more satisfactorily cleared up, there is, I consider, sufficient proof of the prisoner's guilt. It is clearly established that he induced the prosecutor to go with him to a distant village for the purpose of buying skins, and that the two started in company, the prisoner carrying an axe and a lattee. The prisoner himself admits that he went with Haradhun, although he asserts that he was hired to carry the skins when bought. The prosecutor's statement regarding the actual attack is, no doubt, unsupported by direct evidence; the assault having taken place by night and in a lonely place, surrounded by jungle; but the situation in which he was found next morning leaves no room for doubt that he was cruelly wounded with a blunt axe, or some similar weapon, besides having his jaw broken, and one of his teeth knocked out. The medical officer was decided in his opinion that the former injuries could not have been self-inflicted, nor the result of a fall; and, as I before observed when the prisoner and Haradhun started on their journey, the former carried an axe and a lattee. Similar weapons were found in his house after his arrest, and were proved, by evidence, to be his property.

Directly Haradhun was found, he named—though in an indirect manner, caused by the severe nature of the wounds—the prisoner as the man who had attacked him, and this statement he has repeated ever since without variation. There was no ill-feeling between the parties (on the contrary, Haradhun appears to have kept his cattle in the prisoner's house), and no conceivable reason for his accusing the latter falsely.

The defence is that the prosecutor got drunk, fell down, and so injured himself. In support of it one witness deposes that he saw Haradhun lying on the ground the morning after the occurrence, and that the latter told him that he had so fallen; but this witness admits that Haradhun spoke very

Vol. II. gibly, was nearly senseless, and that he (witness) could not understand all he said. There is thus much doubtless of discrepancy in the prosecutor's evidence that Haradhun first said that he had been robbed of Rs. 3-8 only, and that his statements before the Magistrate and Sessions Judge do not tally, *quoad* his having been drinking before the prisoner attacked him; but the discrepancies are after all more nominal than real. Though Haradhun first mentioned Rs. 3-8 as the sum he had been robbed of, he almost immediately corrected himself, and said it was Rs. 10; and considering his state both at the time and afterwards when examined by the Magistrate, the only wonder is that he was able to give any connected account at all of what had befallen him, either on this point or on any other. That he had been drinking he admitted, though he denied being drunk. But the only effect this admission could have would be on Haradhun's power to state correctly what had happened, and to identify his assailant; it could have nothing to do with the prisoner's line of defence, *viz.*, that Haradhun had injured himself by falling on a stone, as the medical evidence clearly establishes the fact that the injuries on the head could not have been so caused. Taking all these circumstances together, I see no reason to disbelieve Haradhun's statement, and so far would reject the appeal.

With regard to the punishment, I would not interfere with the aggregate amount imposed by the Sessions Judge, although I would convict the prisoner under Section 394 only.

As the sentence I propose would be ten years' transportation, the punishment will not have been enhanced, and Section 419 of the Criminal Procedure Code will not apply.

The papers must go before my colleague, Mr. Justice Kemp.

Mr. Justice Kemp.—I concur.

The 4th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Deputy Magistrate (Powers of)—Criminal Trespass—Unlawful Assembly—Mischief—Disputes concerning land.

Queen versus Ootum Mal and others.

Committed by the Deputy Magistrate, and referred by the Officiating Joint Magistrate of Rajshahye, on a charge of unlawful assembly, &c.

A Deputy Magistrate should adjudicate on charges of criminal trespass, unlawful assembly, and mischief, instead of referring the case under Section 318 of the Criminal Procedure Code to the Magistrate.

A Deputy Magistrate, vested with the powers of a Subordinate Magistrate of the 2nd class, cannot institute proceedings under the said Section.

The defendants in the case, out of which this reference arises, were charged before the Deputy Magistrate under Sections 143, 426, and 447 of the Penal Code. That officer (acting apparently under a general order of a former Magistrate of the district) declined passing orders on the question of the illegal assembly, &c., thinking that the defendants were acting under a *bond fide* claim of right in the shape of a pottah from the proprietor of the land; but as he thought a breach of the peace imminent, he sent the case, under Section 318 of the Code of Criminal Procedure, to the Magistrate.

The Magistrate has referred the case here, on the ground that the Deputy Magistrate was bound to adjudicate on the charges of criminal trespass, illegal assembly, and mischief; he also considered that the Court of first instance should have itself decided the point of possession, and not have referred it to him.

We have had, in connexion with the Deputy Magistrate's order, our attention directed to the Full Bench Ruling of this Court, dated 11th June 1864, No. 460, wherein it is laid down that a criminal charge, once instituted and disposed of, should not be revived. But, setting aside the fact that this ruling refers more properly to cases where the plaintiff has allowed his case to be dismissed on default, the present case, we observe, was not disposed of at all. The Deputy Magistrate passed no orders on the several charges made, but referred the matter, with a report, to the Magistrate, to be disposed of under Section 318 of the Procedure Code.

In this, we think, he was wrong. He was bound to decide the case, as it was brought before him under Sections 143, 426, and 447 of the Penal Code, the more especially as there was no question as to the actual possession at the time the alleged illegal entry was made. It was admitted by the defendants themselves that the other side had sowed indigo on the disputed lands, and were in possession, although they claimed a superior right.

We see no reason, therefore, why the charges brought by the plaintiff should not be enquired into by the Deputy Magistrate.

With regard to the Joint Magistrate's second point of reference, we observe that the Deputy Magistrate, Baboo Juggeshur Mookerjee, was vested with the powers of a Subordinate Magistrate of the 2nd class only, and could not, therefore, institute proceedings under Section 318 of the Procedure Code; such power being confined to the Magistrate of the district, or to an officer exercising the full powers of a Magistrate.

The 5th January 1865.

Present:

The Hon'ble F. A. Glover, *Puisne Judge*.

Appeal—Evidence (Sufficiency of).

Queen *versus* Muddun Sirdar, *alias* Gurreeb-oollah, and ten others.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of dacoity, &c. Vol. II.

Objections to the sufficiency of evidence are not a ground of appeal. The deposition of a single credible witness is sufficient in law.

The petition of appeal in this case is made up solely of objections to the sufficiency of the evidence. This was a question for the jury, and they decided that it was sufficient for conviction. The deposition of a single credible witness is sufficient in law; and it was for the jury to say whether the circumstances of the case, and the corroborative evidence tendered, were sufficient to make that one witness's statement credible.

No point of law arises in this case, and the appeal is therefore rejected.

The 5th January 1865.

Present :

The Hon'ble F. A. Glover, *Puisne Judge.*

Kidnapping.

Queen versus Bhungee Ahur.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Sarun, on a charge of kidnapping from lawful guardianship.

The consent of a kidnapped person is immaterial; and it is not necessary, under Section 51, Penal Code, that the taking or enticing should be shown to have been by means of force or fraud.

As the prisoner admits, and has all along admitted, that he took the boy with him, the only point for consideration is the lad's age.

The consent of a kidnapped person is immaterial; and it is not necessary, for a conviction under Section 361 of the Penal Code, that the taking or enticing should be shown to have been by means of force or fraud.

Now, the prisoner before the Sessions declared the boy to be fifteen years old, and his two witnesses have deposed to his being about that age. But the prisoner himself admitted in his defence before the Magistrate that the lad's age was twelve years only, and his father and other witnesses for the prosecution clearly establish the fact that he was under fourteen.

See, therefore, no grounds for interference with the Sessions Judge's order, and reject the appeal.

The 5th January 1865.

Present :

The Hon'ble F. A. Glover, *Puisne Judge.*

Appeal — Enmity of prosecutor — Confession of prisoner (at instance of Police).

Queen versus Gopaul Doss.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Moorshedabad, on a charge of house-breaking by night in order to commit theft, &c.

The pleas that the prosecutor is at feud with the prisoner, and the prisoner's confession was given at the instance of the Police, are not grounds of appeal.

The prisoner in this case confessed before the Deputy Magistrate, and his statement was received by the Sessions Judge as evidence

under Section 366 of the Criminal Procedure Code. Vol. 12.

The facts of the case were properly laid before the jury, who found the prisoner guilty.

He pleads in appeal that the prosecutor is at feud with him, and that the confession was given at the instance of the Police.

Neither of these are points which the Court can take up in appeal. The jury had both these allegations before them, and decided on the evidence against the prisoner.

The appeal is rejected.

The 10th January 1865.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Puisne Judges.*

Retaining counterfeit seals and forged documents, intending to use them fraudulently.

Queen versus Kisto Soonder Deb.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of retaining counterfeit seals and forged documents, intending fraudulently to use them as genuine.

Counterfeit seals and forged documents were found in the prisoner's possession; and, as he could give no satisfactory information as to how he became possessed of them, it was inferred that he kept them with the intention of using them fraudulently.

Mr. Justice Glover.—That a number of counterfeit seals, together with instruments for making them, and a forged document purporting to be a *fysala* of the *Moonsiff* of *Natore*, were found in the prisoner's house, is unquestionable.

The prisoner himself admits the fact, but urges that they were placed there by his enemy, *Ramdhun Chand*.

The recorded evidence, and especially that of the District Superintendent of Police, *Mr. Jenkins*, proves that the houses of the parties, though adjoining, are surrounded by separate court-yards, and further that the only access (other than the door which was padlocked) to the room in which the counterfeit seals were found, was a small window covered with cobwebs, which had evidently not been disturbed for a very long period, and which, had the box been passed into the room by

Vol. II. the window, would have necessarily shown unmistakable signs of the passage.

To the Magistrate the prisoner stated that the *fysala* above mentioned had been left in his charge by one Bisheshur Bagchee, and that it was a genuine document. Before the Sessions he includes it in his general defence, asserting that it was placed in his house by his enemies along with the other articles found. As the finding of what is clearly proved by the evidence to be a forged document, purporting to be the decision of the Moonsiff of Nattore, in the prisoner's house, is admitted by the prisoner himself; and as he further admits that the counterfeit impression of various seals belonging to different zemindars of the district, some of whom are still living, together with sundry tools for manufacturing the same, were found in his house in a room secured by a padlock; as it is, moreover, established by independent and reliable evidence that the only way in which the box containing these counterfeit seals, &c., could have been introduced into the room in question, was by the door which was padlocked; it follows that the articles must be considered as found in the prisoner's possession. And as he can give no satisfactory information as to how he became possessed of them, it may be reasonably inferred that he kept them with an intention to use them fraudulently.

I see, therefore, no reason to interfere with the Sessions Judge's order convicting him alternately under Section 472, or Section 473, and sentencing him to seven years' transportation.

But, in accordance with many rulings of this Court, the sentence of three years' transportation passed on the prisoner on the 3rd count is illegal (*vide* Court's judgment, dated 2nd January 1865, *in re* Mooka Kora, appellant), and this sentence should be altered to one of three years' rigorous imprisonment.

On this point, the case must be laid before my colleague, Mr. Justice Kemp.

Mr. Justice Kemp.—I concur on the point referred to me.

The 10th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
 Puisne Judges.

Witnesses (for defence)—Examination of.
Queen versus Bhoobun Isher Gossamee.

Committed by the Deputy Magistrate of Serajgunge, and tried by the Sessions Judge of Rajshahye, on a charge of theft in a building, &c.

A prisoner on trial is entitled to have his witnesses examined.

Mr. Justice Glover.—It does not appear from the record of this case that the Sessions Judge either summoned or examined the prisoner's defence witnesses. The prisoner stated that his story could be proved by the evidence of certain persons whom he named, and he had a right to have them examined.

Bhoobun Isher was a Brahmin cook, employed in a Kalibaree, or temple dedicated to Kali. He disappeared immediately after the theft, and was not arrested till more than two years afterwards at Kamroop in Assam, when sundry golden ornaments and precious stones were found in his possession. His account is that the theft was a "got-up" affair on the part of one of the shareholders of the temple; that this person sent for him three or four nights after the theft, and made over to him the articles of jewellery in question, telling him to make the best of his way with them to his own house, and to keep them till reclaimed.

The Sessions Judge discredits this story mainly on the ground that a portion of the jewellery was found broken. But if this be a good argument, the converse of it must apply equally to the purjeah and pearl necklace which were found intact. Moreover, it seems to me that, had the prisoner stolen the property, he would hardly have kept it by him in a recognizable shape for so long. But this by the way.

The Sessions Judge further remarks that, even if the prisoner's story were true so far, he would still be liable under Section 411 for dishonestly receiving and retaining. This may perhaps be so; but the limit of punishment under that Section is three years' imprisonment, whereas the prisoner has under Section 381 been sentenced to five.

In any case, he has an absolute right to demand that his witnesses may be examined, and I think that this case should be sent back with directions to record their evidence, and, after taking a fresh opinion from the assessors, to decide the case *de novo*.

The papers must go before my colleague, Mr. Justice Kemp.

Mr. Justice Kemp.—I think the prisoner is entitled to have his witnesses examined; and I, therefore, concur in sending the case back for that purpose.

The 16th January 1865.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Abduction.

Queen versus Komul Dass.

*Committed by the Joint Magistrate, and tried by
the Sessions Judge of Sylhet, on a charge of
abduction and cheating.*

A conviction of abduction quashed, no force or deceit
having been practised on the person abducted.

The prisoner has been convicted on two
counts ; first, of abducting Rajin Dissee (Sec-
tion 366) ; and second, of cheating (section
420, Indian Penal Code).

We have read the evidence in this case.
There is sufficient to support the charge of
cheating, but the offence of abduction is not

made out. The girl was living with the
witness No. 3, Goopee Thakoor. This witness
took Rs. 4 from the prisoner, and per-
mitted the girl to leave his house for the
purpose of being married to the brother of
the prisoner. The prisoner did not marry
the girl to his brother, but passed her off as a
Brahmin's girl, and took Rs. 175 from the
witness Thakoor's son, No. 4. This
witness being doubtful of the girl's caste, an
attempt was made to solve his doubts by
taking the girl back and the witness Goopee
Thakoor (a Brahmin) eat the food cooked by
her. The girl seems to us to have entered
fully into the plot, and no force or deceitful
means were used to induce her to leave the
house of Goopee Thakoor. We confirm the
conviction and sentence on the second count
of cheating, and quash the conviction on the
count of abduction.

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The 16th January 1865.

Present :

The Hon'ble G. Campbell and F. A. Glover,
Puisne Judges.

Use of justifiable violence by Police in capturing a thief.

Queen versus Protab Chowkeedar.

Committed by the Magistrate of Maldah, and tried by the Sessions Judge of Dinagepore, on a charge of grievous hurt.

The wounding of a thief by a chowkeedar in order to his arrest, held under the circumstance to be justifiable.

Mr. Justice Campbell.—It seems to me that the judgment and sentence of the Judge are quite inconsistent. I gather from the judgment and the previous proceedings, that the prisoner in good faith took the complainant for a thief (whether he really was so or not, does not appear), whom he, as a chowkeedar, was bound to capture. If there was any mistake regarding the fact of complainant's being a thief, it was a mistake of fact, and not a mistake of law, and prisoner is entitled to the benefit of Sections 76 and 79 of the Penal Code. Assuming then that prisoner, a chowkeedar, in good faith believed the complainant to be a thief whom he was bound to capture, has he, as the Judge finds the fact, committed the offence charged? I think not. The Judge seems entirely to differ from the Magistrate, who thought that prisoner unnecessarily wounded the complainant. According to the Judge, complainant made a desperate resistance, and "at length prisoner, seeing no other means of securing the fugitive, for whose escape he, as a chowkeedar, would have been held responsible, wounded him with a spear." The wounds were mere "punctured wounds," not dangerous. Under these circumstances it seems to me that the chowkeedar, seeking to arrest a fugitive thief, and who sees no other means of capturing him, is fully justified in using so much violence as is necessary to effect this object. I, therefore, am of opinion that the prisoner in this case should be acquitted and released. It does not appear that the Judge explained to the assessors the law in the above sense; if he had, they might

have acquitted the prisoner. But in this case the Judge, and not the assessors, is responsible for the finding of fact; and it is on the Judge's finding of fact that I would acquit. If a chowkeedar, who finds it necessary to wound a desperate thief (as the only means of capturing him), is to be committed and punished, thieves who resist, as did the present complainant, will never be arrested.

Mr. Justice Glover.—The prisoner, who is a chowkeedar, appears in this particular instance to have acted in a double capacity. The man Bhageerut Napit was found lurking in his house at night, and the prisoner naturally tried to arrest him. The circumstances under which the man was ultimately captured are fully detailed in the Sessions Judge's statement; and it appears to me that the prisoner, whether acting as a chowkeedar, or as a private person effecting an arrest of his own accord under circumstances which justified him in so doing, was fully protected by the law in using that amount of violence necessary to secure the person of the fugitive housebreaker.

The question here would be, whether the means employed to stop the fugitive were such as an ordinarily prudent man would make use of who had no intention of doing any serious injury.

Now, it is admitted by the Judge that the prisoner did not use his spear until he saw no other means of securing the fugitive, for whose escape he, as a chowkeedar, would have been held responsible, and the wounds inflicted do not appear to have been in any way dangerous. Taking all these circumstances into consideration, I think, with Mr. Justice Campbell, that the violence used by the prisoner was justifiable, and that the sentence of one year's rigorous imprisonment passed upon him should be reversed.

The 18th January 1865.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Plea of autrefois acquit—Abetment of false charge of murder (Proof of mala fides).

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Vol. II. Queen versus Muthoorapershad Panday and others.

Committed by the Deputy Commissioner, and tried by the Judicial Commissioner of Chota Nagpore, on a charge of abetting the bringing of a charge of murder, &c.

A former trial, set aside on the ground of want of jurisdiction and illegality, is not a bar to a second trial.

The conviction of a Police Inspector for having abetted the bringing of a false charge of murder quashed, because it was not distinctly shown that he preferred the charge *malâ fide*.

Mr. Justice Glover. This case has been in one shape or other *sub judice* since the beginning of last year. The facts are shortly as follows:-- Ramsurun, a man employed by one Lalla Purushunt Sahai as priest and servant, disappeared from his master's house and service; and two men, Sujeewun Singh and Gujna Dhobee, were sent in by the police as his murderers, prisoners Nos. 4 and 5 giving evidence that they saw them kill him. The original information was preferred to the police on the 15th of August 1863 by the prisoner No. 8, Jilwah, who stated that he gave it at the instance of Mussamut Goonee, prisoner No. 6, Ramsurun's mistress.

The Police Inspector, prisoner No. 7, Muthoorapershad, made his appearance the next day, and commenced his enquiries. His reports were very numerous, and the result of them was that Lalla Purushunt Sahai, Sujeewun Singh, and Gujna Dhobee were charged with the murder of Ramsurun on the evidence of parties above mentioned, and of others who are likewise appellants in this case.

The charge was heard in the first instance by the Deputy Commissioner, who ordered further inquiry, pending which Ramsurun, the man alleged to have been murdered, unexpectedly made his appearance. His story was that he had applied for leave of absence from his master, Lalla Purushunt Sahai, and, being refused, had gone off without permission to his house at Sasseram.

The tables were now turned, and the parties who had sworn to having seen the accused murder Ramsurun, together with the original informants at the thannah, were in their turn put upon their defence, as were also the Police Inspector and the prisoners Nos. 1, 2, and 3.

The Deputy Commissioner, I observe, at first refused to take action in the matter, and it was not until the Appellate Court ordered

an enquiry that the case was allowed to proceed.

The result was that all the prisoners were convicted and sentenced to various terms of imprisonment, the longest being one year.

The Judicial Commissioner, to whom the sentences were referred for confirmation, enhanced the punishment inflicted on prisoners Nos. 1, 2, and 3, and confirmed that passed on prisoners Nos. 4, 5, 6, and 8. Prisoner No. 7, the Police Inspector, he released altogether.

The three first-named prisoners appealed to this Court, when the conviction was quashed (19th May 1864, Seton-Karr and E. Jackson, JJ.) as illegal, and the Deputy Commissioner was directed to commit all the accused to the Sessions. The High Court's judgment contains a very complete *resumé* of the whole case, and makes it unnecessary for me to enter into a lengthened statement now.

The commitment was made accordingly, and the Judicial Commissioner has now convicted all the prisoners, sentencing them to various terms of imprisonment; and from this sentence they have again appealed.

The counsel for Muthoorapershad, the Police Inspector, takes an *in limine* objection as regards his client, urging that, as he was acquitted by the Judicial Commissioner at the first trial, he could not be tried over again, and that the present conviction is therefore illegal.

On this point I observe that the High Court quashed the whole of the original proceedings as being altogether without jurisdiction, and therefore illegal. The first trial was in fact no trial at all, and the result cannot be pleaded as *autrefois acquit*, it being essential to that plea that the first Court should have had a competent jurisdiction of the offence.

Before considering the evidence on the merits as affecting all the prisoners, I would remark on the exceedingly disproportionate punishment inflicted on prisoners Nos. 1, 2, 3, and 7. Supposing the case proved, the sentences on all those prisoners are utterly inadequate, notably so in the case of the Police Inspector, who has been sentenced to three years' imprisonment only; and I entirely dissent from the Judicial Commissioner's argument that former good character or service should be, under the circumstances of this case, a ground for diminution of punishment.

To return to the record, however, for convenience sake, I will take up the appeal of

Muthoorapershad first. He has been convicted (1) of having abetted the bringing of a false charge of murder, knowing that there was no just ground for such proceeding, and (2) of preparing an incorrect document purporting to be a statement made by Sujeevun Singh and Gujna Dhobee, with intent to cause injury to them, he being a public officer.

He urges in appeal that the facts on which the Deputy Magistrate has based his judgment are not borne out by the evidence; and that, were they so borne out, they would not justify a conviction.

Now, the first thing that strikes me in going into the case against Muthoorapershad, is the extreme *prima facie* improbability of the prisoner having acted as he did, knowing that the charge of murder was false. According to the evidence, he went heart and soul into the matter, wrote numbers of reports, bullied men and women whom he thought knew anything of the matter, beat and otherwise maltreated those whom he afterwards sent in as witnesses, and all this he did, knowing that the man Ramsurun was not only not dead, but was only distant a few miles; knowing, moreover, that he might be expected at any moment to make his appearance, and confound the police officer's machinations.

That Muthoorapershad commenced the enquiry, believing the story of Ramsurun's death, is admitted; and to bring the present charges home to him, it must be shown on such evidence as to leave no reasonable doubt on the mind that he almost immediately discovered the falsity of the first report, and yet entered into a scheme with others to bolster up its authenticity for the purpose of bringing a false charge against persons with whom he had no acquaintance and no enmity. It is not enough to prove that the Police Inspector acted carelessly or rashly, or even with criminal neglect of his duty; it must be distinctly shown that, in preferring the charge of murder, he did it *malâ fide*.

Now, on looking at the evidence, although I find ample proof of Muthoorapershad's folly, ignorance, and worse, there is nothing in it which to my mind proves him guilty of the heavier offence; that he exerted himself to collect evidence in all sorts of ways; that he ill-treated witnesses till they promised to depose as he wished; that he stupidly allowed himself to be altogether led by the statements of the other prisoners, is clear. He showed himself utterly unworthy of the post

he held, to be ignorant, tyrannical, and in short almost everything that a police officer should not have been; but all this does not prove that, when he made the charge against Purushunt and others, he knew of Ramsurun's being alive, or that, when he sent in his report, he did so, knowing it to be false. His conduct appears to me to have been that of an unscrupulous man, eager to earn a name for smartness and capacity, and caring nothing how he managed so as he got up a good case. I might even go so far as to admit, for the sake of argument, that he knew that the witnesses whom he maltreated were ignorant of the murder, and that notwithstanding that he tried to make them depose as he wished; but even this is no proof that the Inspector himself knew of the falsity of the charge. He might be found guilty generally of fabricating evidence, but not of the crime of which he is charged.

In cases like the present, the knowledge that a charge is a false one, must be inferred from the circumstances, judged of according to the facts as they were known, or supposed to be, when the charge was made. Now, there can be no doubt that, when the man Julika went to the thannah to report, the Police Inspector believed the man's story; and there was nothing in the after and more complete enquiry to make him *necessarily* think that he had been deceived. There were rumours that Ramsurun had run away, but there were also rumours that he had been murdered, and as the recusant witnesses refused in acknowledging the latter fact to be true, it can hardly be wondered at if Muthoorapershad thought it true likewise; it must not be forgotten that the prisoner would, from his antecedents, be naturally inclined to follow out what used to be a very common method of obtaining evidence, and to care little how he got the testimony he wanted, provided that he did get it.

With regard to the human bones, &c., on which considerable stress has been laid by the Judicial Commissioner, I do not see that the fact proves anything. It would not be easy for a non-professional man to distinguish between male and female bones; but, granting the prisoner's knowledge, it would still be only a proof of his unsuitness for office: he might still have believed that Ramsurun had been murdered, although he knew that the bones found were not his bones.

The prisoner's counsel has dwelt at considerable length on services rendered by

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Vol. II. Muthoorapershad, and on the fact of his having saved European life during the mutiny. But this is beside the question; and the only thing, perhaps, deducible from it is that the prisoner, from his antecedents and character, was altogether unfitted for the post of Police Inspector, and might be supposed to have fallen an easy dupe to Bengalee intrigue.

Taking, however, all the evidence into consideration, I think that the presumptions against the prisoner (and all the evidence against him is presumptive) are more than neutralized by those in his favor; and that, taking the most unfavorable view of his case, he is entitled to the benefit of the doubt.

I would acquit this prisoner.

I see no reason to interfere with the decision of the Judicial Commissioner in the case of prisoners Nos. 1, 2, and 3. They are distinctly proved by the evidence to have been the prime movers in the whole business—to have got together the persons who were to give evidence to have managed the affair of the bones to have given up their house to the Police Inspector and to have pushed on the enquiry against Lalla Purushunt and his relatives with the greatest eagerness. It is also established that they were at feud with the Lalla on account of land. The witnesses for the prosecution depose most distinctly on these points, and I can see no ground for ignoring their statements. If they are to be trusted, the prisoners knew all along that Ramsurun had gone to his house, and that the charge of murder was absolutely false. Doubtless, there remains in their case the same *prima facie* improbability as that noticed before; but there is this difference between the cases of these prisoners and that of the Police Inspector—in the one, the evidence was presumptive only, in this it is direct. Muthoorapershad might possibly have known the truth—these prisoners, if the evidence is to be believed, must have known it.

Prisoners Nos. 4 and 5 are guilty by their own admission. They confess that they knew the true state of the case, but urge that they were forced to give false evidence by the threats of the Police Inspector. This plea does not bring them within the exception in Section 94 of the Penal Code, as there was no apprehension of instant death before them, and could only operate in their favor by mitigating the punishment fixed by law for their offence. They have been sentenced each to five years' rigorous

imprisonment, which is not too heavy a punishment.

With regard to the prisoners Nos. 6 and 8 also, I see no reason to interfere. It may be that the woman did at first think that Ramsurun had been made away with in spite of the information given her by Lalla Purushunt's family; but there is ample evidence to show that, after the police took the matter up, both she and Jhilwah, prisoner No. 8, exerted themselves in getting up the false evidence on which the accused persons were arrested. It is possible enough that both these prisoners have been tools in the hands of the greater offenders, prisoners Nos. 1, 2, and 3; but they are clearly guilty on the evidence of abetting a false charge of murder, and their sentence is not too severe for that offence, supposing the most cogent extenuating circumstances.

The sentence of ten years' transportation passed on the prisoners Nos. 1, 2, and 3 on the counts is, according to frequent rulings of this Court (*vide* Rule 3 of Criminal Order No. 14, dated 20th August 1864), illegal. The sentence will be amended to one of seven years' transportation and three years' rigorous imprisonment; to commence either before or after the heavier sentences. The fine will, of course, stand.

The case must be laid before my colleague, Mr. Justice Kemp.

Mr. Justice Kemp. I have considered this case carefully. My colleague proposes to acquit the prisoner No. 7, the Police Inspector, and with this view the papers have been sent to me. My learned colleague has entered into the case so fully that I have little to add. The essence of the charges against the prisoner is that he acted as he did with a guilty knowledge. On a review of the whole evidence and circumstances of this case, I am satisfied that the prisoner's conduct was influenced by the conviction that a man had been murdered. These proceedings were certainly most unjustifiable, and such as show him to be quite unfit to be a police officer, however meritorious his past services as a soldier may have been. He did what almost all the darogahs of the old school did, and some of the new police still do, *viz.*, resort to torture to extract a confession. But that he knew, at the time that he did so, that no murder had taken place, and that the man was living and within a short distance, I cannot credit. I concur in acquitting him of the charges made against him. I trust that he will be removed from the police force.

The 23rd January 1865.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Robbery—Theft—Jury (Verdict of).

Queen versus Sakhaut Sheikh.

Committed by the Deputy Magistrate of Junghpore, and tried by the Sessions Judge of Moorshedabad, on a charge of robbery.

In a trial for robbery, it is competent to the jury, if they disbelieve the evidence as to the assault (*i.e.*, as to the circumstances of aggravation) to bring in a verdict of guilty of theft.

Mr. Justice Glover.—It appears to me that the Sessions Judge was wrong in refusing the verdict of "theft" which the jury wished to give.

The prisoner was charged with robbery. He was a peon employed by the prosecutor, and on the occasion in question was journeying in company with his master, and carrying a bag of money. He is said to have seized the opportunity of the prosecutor Lakim Mundle's back being turned to knock him down and make off with the money.

No doubt, if this evidence were believed, the offence would amount to robbery; but the credibility or otherwise of that evidence was a question for the jury, and they wished to decide it in the prisoner's favor, and to bring him in guilty of the lesser offence of theft.

I do not understand how the Judge considered such a finding as contrary to law. It might or might not have been contrary to the weight of the evidence; but that was a point on which the jury were the sole Judges, and the Judge had nothing to do but receive their verdict as given.

Under a conviction for robbery, the prisoner has been sentenced to seven years' rigorous imprisonment, whereas, had he been convicted according to the verdict which the jury desired to give, the limit of his punishment would have been three years.

He appears, therefore, to have been improperly prejudiced, and, in my opinion, this conviction should be quashed, and a new trial held.

The papers must be laid before Mr. Justice Kemp.

Mr. Justice Kemp.—The prisoner has not taken the point of law; but, as the error of the Judge has prejudiced the prisoner, I am of opinion that this Court is competent to notice the point. Vol. II.

If the statement of the prosecutor as to the assault by the prisoner be credible, the offence committed by the prisoner was robbery. The jury, who are the sole judges of a fact of this nature, disbelieving the evidence of the assault, that is to say, the circumstances of aggravation, brought in a verdict of guilty of theft. The Judge refused to receive this verdict, being of opinion that it was illegal as contrary to the evidence, and directed the jury to re-consider their verdict. The jury then brought in a verdict of guilty of robbery. The conviction must be quashed as proposed by my learned colleague, and a new trial held.

The 24th January 1865.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp and F. A. Glover, *Puisne Judges.*

Judgment of Sessions Judge (confirming illegal sentence of Assistant Magistrate)—Appeal.

Queen versus 1, Mohesh Chunder Chuttopadhia ; 2, Madhub Chunder Chuttopadhia ; 3, Huris Chunder Biswas ; 4, Gobindo Chunder Chuttopadhia ; 5, Ramgotee Gorie ; 6, Issur Chunder Sein ; 7, Ram Churn Chuttopadhia ; 8, Bunwaree Dass ; 9, Gobind Dass Byraghee ; and 10, Kurum Sheikh.

Committed by the Assistant Magistrate of Koosh-teah, and tried by the Sessions Judge of Nuddea, on a charge of rioting and abetting the same.

The Assistant Magistrate having decided a case without examining the witnesses for the defence named by the prisoners, the Sessions Judge, on appeal, ordered the evidence of those witnesses to be taken by the Assistant Magistrate. Their depositions having been returned to him, the Sessions Judge proceeded to deal with the case under Section 422 of the Code of Criminal Procedure, and, convicting all the prisoners, confirmed the judgment and sentence passed by the Assistant Magistrate. **Held** that the judgment of the Sessions Judge (though in form confirming the Assistant Magistrate's judgment and sentence) was in substance an original judgment, and that, under Section 408, an appeal lay from it to the High Court upon the merits.

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With reference to the evidence and the probabilities of the case, the majority of the Court (*discontente* Norman, C.J.) acquitted the prisoners.

Mr. Justice Kemp.—This is an appeal from the decision of the Sessions Judge of Nuddea, Mr. Rivers Thompson, dated the 19th of December 1864.

The prisoners from Nos. 3 to 10 have been convicted of the offence of rioting; and the prisoners 1 and 2 of abetting that offence.

A preliminary objection is taken by the learned counsel for the prosecution that no appeal will lie to this Court. I am of opinion that an appeal will lie, and that the prisoners, appellants, are entitled to be heard on the merits of the case. The conviction by the Assistant Magistrate of Kooshteah was wholly illegal; the Sessions Judge, on appeal, exercising the power vested in him by Section 422 of the Code of Criminal Procedure, directed the Assistant Magistrate to take evidence "bearing upon the guilt or innocence of the prisoners," which the Assistant Magistrate had omitted to do. The result of the further enquiry was certified to the Appellate Court by another officer, who had succeeded in the meantime to the office of Assistant Magistrate of Kooshteah, and the Appellate Court proceeded to pass the sentence which that Court deemed to be a just and proper one. This sentence is, therefore, the sentence of the Sessions Judge, for which that officer alone is responsible; and an appeal will lie to this Court on the whole case. The mere coincidence of sentences, and the fact that the Sessions Judge has not thought proper to enhance or mitigate, but has passed the same sentence as that originally passed by the Assistant Magistrate in the trial which was no trial at all, ought not to deprive the prisoners of the benefit of an appeal to this Court on the facts. It is satisfactory to think that, in a case of this importance, the Court is so far unanimous in opinion that the prisoners are entitled to be heard on the facts.

The case itself is one which happily is not of common occurrence elsewhere, but is peculiar to the disturbed indigo districts of Nuddea and Jessore. It is not a pleasant picture—that of three Europeans beaten by a native rabble. The prosecutor is Mr. Charles Meares, an assistant indigo planter, employed by Mr. Hills. The European witnesses who have been examined are three in number—Mr. Meares, Mr. Thomas Savi, also an assistant indigo planter under the

same employer, and Mr. F. Abbott, who is unconnected with Mr. Hills. This gentleman is a cousin of Mr. Meares, and was residing with him as his guest when the riot took place. The native witnesses for the prosecution are five in number—No. 1, Jugoo Biswas, an ameen of the factory; No. 2, Kurum, a tagadageer of the factory; No. 3, Kasissur Mookerjee, a tehsildar; No. 4, Ramchund Roy; and No. 5, Budyanath Chatterjee, inhabitants of the village of Doorgapore where the riot took place, and who are alleged to be independent.

A few words as to the prisoners Mohesh Chunder Chuttopadhia and Madhub Chunder Chuttopadhia, whom I shall, in the sequel of my judgment, style Mohesh and Madhub for the sake of brevity. They are two brothers, residents of Doorgapore, men of substance and great local influence. Mohesh, the elder brother, is notorious as the staunch advocate of the weaker cause—that of the ryots throughout the unhappy indigo controversy. It is not too much to say that Mohesh is obnoxious to the planters. The Sessions Judge tells us that he is "especially so to Mr. Meares." Mohesh has been employed under the Government as a foudattee serishtadar, and it may be assumed that he is well up to all the tactics and dodges of a case of this description. The prisoners, Huris Chunder Biswas, No. 3, Gobindo Chunder Chuttopadhia, No. 4, Ram Churn Chuttopadhia, No. 7, are all Brahmans, serving as tehsildars under Mohesh; these three prisoners "are *kulum peshala*," as the natives would term them, "men of the pen." The prisoner Ramgotee Gorie, No. 5, is an inhabitant of Doorgapore, and a ryot of prisoner No. 1; he gains his livelihood by selling oil, and is described as a "quiet, inoffensive man." Issur Chunder Sen, prisoner No. 6, also an inhabitant of Doorgapore, is, as far as can be ascertained from the record of the case, unconnected with the two prisoners Nos. 1 and 2. Bunwaree Dass, prisoner No. 8, is the *bundtree* or cook of the two Baboos, Mohesh and Madhub. Gobind Dass Byraghee, prisoner No. 9, is also a domestic servant of those two gentlemen; and Kurum Sheikh, prisoner No. 10, the only Mahomedan who figures in this case, is the ryot of Mohesh and Madhub. The main facts of the attack upon Mr. Meares and his companions (for that they were attacked is beyond doubt) are fully and correctly stated by the Sessions Judge, and I shall not repeat them. In this appeal I have to con-

sider this question alone—did the prisoners Mohesh and Madhub abet that attack, and the other prisoners take any part more or less active in that attack? If there be reliable evidence that they did so, the conviction is good, and the sentence passed is certainly not too severe.

I take the European evidence first. It appears that Mr. Meares almost immediately after the attack proceeded by train to Kooshteah, and complained to the Assistant Magistrate, Mr. Kemble. That officer, with a promptitude which is most creditable to him, at once proceeded by train to Alumdangah, and from thence to the village of Doorgapore, the scene of the attack. Mr. Kemble arrived at Doorgapore at about 3 p.m. on the day of the riot, which, by all accounts, took place at 9 a.m. He then proceeded to the house of the prisoner Moheshi, and commenced his investigation. Mr. Meares then made his statement (the Sessions Judge is in error in treating this as a deposition). This statement, which is of the utmost importance with reference to the whole case, and the subsequent deposition of the witness Meares, is here given "*in extenso*."

Mr. C. Meares complains that he was attacked at Doorgapore by some men with spears and lances, one of whom speared his horse *from behind*. Points out now at Mohesh Chunder's house as *among those who were of the party*.

1. Mohesh Chunder Chuttopadhia.
2. Hurree Biswas.
3. Ram Churn Chatterjee.
4. Bunwaree Doss.
5. Gobindo Doss.
6. Madhub Chunder Chuttopadhia.

The Assistant Magistrate, observing that it "was too late to proceed further in the case on that day," directed the six men named above to furnish bail each to the amount of Rs. 500. Mr. Meares was instructed to appear on the morrow with his witnesses. This order is dated the 26th September 1864.

The case was disposed of by Mr. Kemble on the 29th of September. No reasonable time was given to the prisoners to prepare their defence, or to secure the aid of legal advice, though they applied for only a day for that purpose. The consequence was that the witnesses were subjected to no cross-examination worthy of the name; and here I regret to record that the Assistant Magistrate, who displayed so much energy in the commencement of the enquiry, so far lost sight of all the first principles of justice

and fair play in his unseemly haste to get rid of the case, that he neglected to summon and examine the witnesses cited for the defence. This gross injustice, I am happy to say for the ends of justice, was rectified by the Sessions Judge, and the prisoners have, on the whole, no reason to say that they have not had a fair trial. To return to the case, it will be observed that on the 26th of September, the very day of the attack, indeed, a very few hours after its occurrence, when it may be fairly assumed that the whole facts of the case were fresh in the memory of Mr. Meares, he distinctly stated that the two brothers, Mohesh and Madhub, two of their *tehsildars*, and two of their domestic servants, were of the party who had attacked him on that day; and, further, that they were armed with spears and sticks. Now, what do we find Mr. Meares deposing to on the 27th, the next day? He does not mention the two brothers whom he had denounced on the 26th as of the party who attacked him, or as taking any part in that attack. He shrinks from doing this; he leaves this to be done by less scrupulous witnesses. He deposes that, when he passed the front of the house of Mohesh on the day of the attack, Mohesh and Madhub were "sitting on a log of wood at the door;" that "he did not see Mohesh when he was attacked;" that "the men who attacked him were *village men*," amongst whom he recognized Bunwaree Doss No. 8, Ilurri Chunder Biswas No. 3, Gobindo Doss Byraghee No. 9, and Ram Churn Chatterjee No. 7. He goes on to state that, when the villagers attacked him, he heard "some one from behind backing them up." Now, who are the men whom Mr. Meares recognizes as amongst those villagers who attacked him or his party? They are—*first*, the cooks of Mohesh. Mr. Meares admits that he had only seen Mohesh, the master, twice before the attack. Are we to suppose that Mr. Meares was so well acquainted with the person and features of the servant, that he could recognize him in a sudden attack made upon him, and which, by his own account, could not have lasted many seconds, for he describes it thus—I quote his own words:—"They all rushed at me at once. I rushed past them (it must be remembered that Mr. Meares was on horse-back); and, as the first man struck at me with a stick, I struck at him, and *hit something*, and rode on." So precipitate was Mr. Meares's retreat that he did not even turn back to lend a helping hand to Mr. Savi, a

Vol. II. brother assistant, whom he had brought into the mess, though he admits that one hasty glance behind, as he fled from the tehsildar and cooks, showed to him Mr. Savi on the ground, unhorsed and helpless. Then who are the other men whom he alleges that he recognized in the *melee*? Two tehsildars and, strange to say, another domestic servant of Mohesh Baboo. Are these the kind of men who take a part in attacks of this description? Are lattals no longer to be hired in Bengal? My past experience of the natives extending over thirty-four years, if worth anything, has taught me that these are not the kind of men who mix themselves up in cases of this description—"well-known men in the village"—"men in the service of the alleged prime mover of the whole affair." I regret to say that the evidence of Mr. Meares as to the recognition of these men has left anything but a favorable impression on my mind. I would rather hope that he was mistaken as to their identity, than think that he has deliberately stated an untruth. In the matter of the abetment of the offence by the two brothers, Mohesh and Madhub, it must, I think, be admitted that the evidence of Mr. Meares does in no way implicate them.

The evidence of Mr. Savi implicates none of the prisoners. This gentleman states that he saw "four or five men near the porch of the house of Mohesh Baboo, all sitting on a log of wood;" that "the attack was made by fifteen or sixteen men; that three or four men came at him; that one man hit him on the thigh with a stick; that they struck his horse three or four times; that his horse fell into a ditch on the road side," and here occurs an important passage—"a Brahmin helped me up," saying, "not this *sahib*; if you want to beat, beat Mr. Meares." The witness goes on to say: "I could not recognize any of the people who attacked us, or who were at the door." I heard *people* calling out, "*mar salake*," from the door." It is remarkable that, although Mohesh was confronted with Mr. Savi, that gentleman was unable to say that Mohesh was the Brahmin who lent him a helping hand in his stress; and one, and only one, of the factory servants, *viz.*, Kurum—who, if the European witnesses are to be believed, was on ahead, and could not possibly have witnessed the charitable act of this Brahmin—ventures to swear that Mohesh was that Brahmin.

The witness, Mr. Abbott, a young man lately arrived in the country, admittedly

ignorant of the locality and the language of the country, deposes that, on his return home through some villages, and near a large *puckha* house, he observed four or five men congregated near the door of that house (he is unable to say who they were); that some men came from a sort of passage leading to the house and attacked his party. He then says, "one man attacked me, and we rode off, I could not recognize any of them."

This is the European evidence. Before I proceed to comment upon the native evidence, I have a few remarks to make upon the alleged origin of this attack, and upon the probabilities of the case; for, in charges of this description, when we have to deal with native witnesses, never very truthful, and who, in this instance, are one and all hostile to the prisoners Mohesh and Madhub, we ought not to lose sight of probabilities.

It is alleged that Mr. Meares had lately taken up some land for indigo purposes. Where this land is, is not shown; one thing is very clear, that there is no proof on the record, nor is it alleged that Mohesh and Madhub had any interest or stake in this land. Mr. Meares tells us—I quote his own words—that "he had heard from his servants "that the ryots of certain villages," he does not mention the villages, "had threatened "to sow down the said lands with *kulaye* "crop." On the morning of the attack, Mr. Meares, with Messrs. Savi and Abbott, and the two factory servants, Jugoo Biswas and Kurum Tagadageer, went to visit these lands, expecting, as they admit, a disturbance; but they found no opposition. Now, there is nothing to connect Mohesh and Madhub with these lands. There was, therefore, and this is an important fact, no immediate motive why the two brothers should select that particular day for the attack upon Meares, accompanied as he was by two European gentlemen and two factory servants available as witnesses, and much less why Mohesh should select as the "*locus in quo*" the high road of his native village, and lay the scene of the attack before his own door. It was pertinently observed by Mr. Doyne, the learned counsel for the prisoners, that Mohesh, with his great local influence, might bring a cloud of witnesses to rebut the charge of being personally implicated in any attack, but that he could not well swear away the "*locus in quo*." Again, looking to probabilities, is it not in accordance with our experience in these matters that two Bengalee gentlemen, brothers, one of them sick and delicate, should select such a spot for an

attack upon three European gentlemen—that they should coolly sit on a log of wood in midday in the high road in the midst of a populous village where, it is admitted, they have enemies, and court recognition by shouting out “*mar sala mar!*” It may be argued that criminals at times forget all prudence, all precaution, when they give way to their evil passions, and that respecting them it may be said, “*Quem Deus vult perdere prius dementat.*” But, in the present instance, the act with which the Baboos were charged was not the act of men whose passion had been suddenly roused, and who, therefore, might be reckless of consequences; for the story of the prosecution is, that the approach of the planters was watched for, that a skirmisher was thrown out in the person of the prisoner Huree Biswas (a tehsildar, forsooth, the last man who would be used for such a purpose, a well-known man)—in short, that the plot was a well-concocted pre-concerted plot. Lattials collected armed, some with spears, and some with sticks; nothing remaining to be done but for the Baboos to give the hint, and the attack would commence. Is it probable, is it consistent with the known tactics of zemindars in these matters, that the two Baboos should quietly sit down in an exposed position surrounded by their cook and tehsildars, and court recognition entailing upon themselves and their servants, by so doing, certain and rigorous punishment? I cannot for a moment believe that these parties were guilty of any such act of folly.

Mr. Meares tells us that he was warned by his servant, the witness Kasissur, tehsildar, that he might expect to be attacked if he passed through the village of Doorgapore. Mr. Meares disregarded that warning. Another improbability presents itself here. Kasissur deposes that he passed through Doorgapore that morning, and saw lattials collected in the house of Mohesh; and we are asked to believe that he was permitted to go on his way and give warning to his master, and thus perhaps (for it could not be known to Mohesh that Mr. Meares would be so reckless of danger as to reject all warning) to balk Mohesh of his object and defeat his deep-laid plot, entailing the loss of such a favorable opportunity of wreaking his vengeance upon his enemy. The Sessions Judge tells us that Mr. Meares rarely passed through Doorgapore, so the opportunity was not to be lost.

I now come to the native evidence, which may be divided into two classes—*first*, wit-

nesses wholly dependent upon the factory; *second*, witnesses said to be independent. The first class, the factory servants, have done what might be expected from them. They have implicated all the prisoners, with the exception of Madhub; his implication comes from one of the so-called independent witnesses. All the factory servants, who have deposed in this case, are the enemies of Mohesh. Jugoo Biswas admits that he has given evidence for Mr. Meares before, and that he has himself been beaten; Kurum has given evidence against Mohesh before this; Kasissur has a caste feud with Mohesh, and, though both are Brahmins, they will not eat together. The deliberate way in which these three witnesses, in a scene of confusion and hurry, depose to the identification of ten men, describing what each man did, and in some instances what he had in his hand (one of them, Kurum, coolly excusing himself for not naming more by saying that he was frightened), deprives their testimony, in my estimation, of any credibility. They have sworn like all native witnesses of this stamp to *too much* to be believed.

The two so-called independent witnesses are Ramchurn Roy and Bydonath Chatterjee. These witnesses were cited at the suggestion of Mr. Hills, Junior—at least so I was informed during the course of the argument. They were called on the very same day on which Mohesh put in a petition, giving his version of the affair, and in which he appealed to the whole community of the village to vindicate his innocence with the exception of certain parties whom he named, and denounced as his enemies, and amongst them are these two independent witnesses.

These two men, if they had been independent, coming as they do from Doorgapore, would have been entitled to much credit. As it is, I can have no hesitation in saying that I am of opinion that at least one of them, Ramchurn Roy, has deliberately given false evidence in this case. He admits that he is on bad terms with Mohesh; that he has cases in Court with him; and the prisoner Gobind Doss Byraghee, the servant of Mohesh, is also his enemy. This witness tells us that, when the attack took place, he was in a stamp-vendor's shop, that he heard a noise on the road, and ran up to see what was the matter. He does not explain why he should, contrary to native habits, thrust himself into a riot, and thus entail upon himself all the inconveniences of being made a witness of and being drawn

Vol. II. away from his business, which he states to be that of a mahajun. This witness, once a witness, is a most willing one, for he goes beyond even what the factory servants venture to do, and deliberately swears that he heard both the brothers, Mohesh and Madhub, cry out "*mar salako mar.*" He then goes on to say, "I think Issur Sen speared Mr. Meares' horse," and why? Because he had a spear in his hand. He further swears that he saw Issur Sen run up just before he saw the blood coming from the horse. Now, it must be remembered that Mr. Meares has deposed that the rioters *rushed* at him; that a rapid blow was aimed at him, and that he rushed past, and made off at full gallop. Can we believe that this witness could, by any possibility, run from the stamp shop, which is two *rustees* off from the scene of the attack by Bydonath's account, and be in time to witness the spearing of the horse and the flow of blood from the wound? It is utterly beyond belief, and the man has told a deliberate falsehood. Again, this witness recognizes, not only the two brothers, Mohesh and Madhub, but the whole of the remaining prisoners, and tells us who among them were armed with spears, and who with sticks; and here it may be remarked, as showing the *animus* of the man, he places spears in the hand of Gobindo Doss Byraghee, his enemy, and Bunwarce, the cook, both the domestic servants of his more bitter enemy Mohesh. He ends his false statement by asserting, contrary to the statements of all the other witnesses, European and Native, that Mr. Meares was behind, and that it was Mr. Meares who fell. How the Sessions Judge could credit such evidence, I cannot understand.

The remaining witness is Bydonath Chutopadhiya; his hostility to Mohesh leaks out at the end of his deposition. He is the servant of Ram Sunker Odhikaree, who is on bad terms with Mohesh. The witness admits that he does not eat with Mohesh, and we are told that there are two parties in the village. This witness was also in the stamp-vendor's shop with Ramchurn Roy; he does not go to the lengths that Ramchurn does; he plays the part of an unwilling witness, and says that he heard a great noise: that he went out and saw three gentlemen on horseback surrounded by men with sticks; that Mr. Meares and the other *sahibs* rode off; and that the laltials went with them! Is unable to say whether Mohesh was there: recognized only Bunwarce and Ramgotee Goral.

This is the whole of the evidence for the prosecution, and, for reasons already given, I do not credit it. I might stop here; but as the case is one which has excited much interest, and as the prisoners in the native fashion, not content to rest their case on their own innocence, have brought a counter-charge against the factory of a sham attack, which they have failed to prove to my satisfaction, I proceed to give my idea of the probable facts of the case in a few words.

Mr. Meares and his party expected to be attacked on the field, which was the principal object of his morning rounds. The villagers of Doorgapore, who had threatened to beat Mr. Meares, and were watching for an opportunity of doing so, intended to attack him in the field, but they were prevented from doing so by Mr. Meares' early visit to the spot. On his way home, Mr. Meares rashly determined to pass through Doorgapore. The attack took place in that village, and was, in my opinion, the act of the exasperated ryots by whom Mr. Meares is hated. It may very well be that Mohesh and Madhub were not sorry to see their enemy beaten; that they remained passive; but, beyond this, there is no reliable evidence that they took any part, direct or indirect, in the attack, or that their servants, who would hardly act without their own cognizance and approval, did so.

Taking these views of the whole case, after earnest consideration of the evidence, and, with a sincere wish to do justice between the parties, it is my duty to acquit all the prisoners.

The Chief Justice.—Eight of the appellants were convicted by Mr. Kemble, the Assistant Magistrate of Kooshteah, of rioting; and two, Mohesh Chunder Chatterjee and Madhub Chunder Chatterjee, of abetting this offence.

The Assistant Magistrate committed the serious error of deciding the case without examining the witnesses for the defence named by the prisoners. The Sessions Judge, on appeal, ordered the evidence of these witnesses to be taken by the Assistant Magistrate; and such depositions having been returned to him, he proceeded to deal with the case under Section 422. and, convicting all the prisoners, confirmed the judgment and sentence passed by the Assistant Magistrate.

The question was raised and argued before us at considerable length, whether, under these circumstances, an appeal upon the facts lay to this Court.

We think that the true effect of the Judge's decision was to quash the trial and conviction before the Assistant Magistrate, in which the evidence on one side only was heard; that the judgment of the Sessions Judge was in substance, though not in form, an original judgment. That being so, it is clear that the conviction now appealed against was a conviction on a trial held before a Sessions Judge within the meaning of those words in Section 408; and that from such a conviction an appeal lies to this Court. In this view of the case, it is wholly immaterial whether the sentence passed by the Sessions Judge corresponded with that of the Assistant Magistrate or not.

We must, therefore, go into the case upon the merits.

On the 26th of September last, Mr. C. Meares, of Pomiaree factory, an assistant of Mr. Hills, accompanied by Mr. Abbott, a cousin, who was staying with him, went to the Doorgapore factory. They were met by Mr. Savi, also an assistant of Mr. Hills, who lives at the Paikparrah factory. Meares asked Savi and Abbott to accompany him to see some lands which he said some villagers had threatened to sow with *kulaye*. He said he had heard that the ryots had threatened to beat him. On arriving upon the land, they found no ploughs there, nor any sign of *kulaye* being sown. Jugoo Biswas, the ameen, and Kurum, the tagadageer of the Doorgapore factory, were on the ground. Mr. Meares deposes that shortly after they left the ground, he saw a man sitting on the road with a stick in his hand, who, on seeing the party coming, got up and ran towards the village. The witness Kurum recognized this man as the prisoner Huris Biswas, who is the tehsildar of the prisoner Mohesh Chunder Chatterjee. Soon after this, they met Kasissur Mookerjee, a tehsildar of the Doorgapore factory. He told Mr. Meares and his party to stop, as a number of people were collected at Mohesh Chunder Chatterjee's house. Mr. Meares said he did not care, and proceeded onwards the village. He says:—"As we passed by the house of Mohesh Chunder Chatterjee, we saw some men in front of us. As soon as they saw us, they rushed at us with sticks and spears. They were village men. This was after we had passed the door of the house. The men came from round the corner of the house. They first came at me. They did not touch me. They then went at Mr. Abbott, who was on the left of me, and Mr. Savi, who was behind us. We all gal-

loped off. Mr. Savi fell. I turned round and saw him on the ground. He got on his horse again, and followed us on. We did not turn back to help him. When we passed the front of the house, Mohesh Baboo and Madhub Baboo were sitting on a log of wood at the door. I did not look back after the men attacked us. I did not see the Baboo then. We did not exchange words when we passed the door. When the men attacked us, I heard some one from behind backing them up. I can't say whether it was the Baboos or not. I recognized amongst the men who attacked us this man amongst Bunwaree Dass, Gobind Dass Byraghee, Huris Chunder Biswas, Ram Churn Chatterjee. (Mr. Kemble notes that these men were pointed out as they stood in the room, and had been pointed out at the house of Mohesh Chunder on the previous day.) On my arrival at home, I found that my horse had received a spear wound through his stifle. They all rushed at me at once. I rushed past them; and as the first man struck at me with a stick, I struck at him, hit something, and rode on. I did not pass the village on the way to the fields. I had no words with any one. The attack was entirely unprovoked."

On cross-examination by Mohesh Chunder he said: "I have been along the road before. I go along it very seldom. I have sometimes seen Mohesh Chunder Chatterjee; I have seen him twice before, that on the river bank, not on the road by his house. Mr. Abbott is my cousin, who is on a visit to me. Mr. Savi came to see the nail at Doorgapore. I think I saw him at the factory, and asked him to come along with me."

To the Court: "I asked Mr. Abbott and Mr. Savi to accompany me, as I anticipated that there might be a row on the land I went to see. The ryots, I heard through my servant, had threatened to give me a beating."

In answer to a further question by the Court or some other prisoner, he said:—"When I passed the door, I saw Ram Churn Chatterjee and Huris Chunder Biswas at the door. I did not see them afterwards."

Mr. Savi, the next witness, states that a Brahmin tehsildar came and told Mr. Meares that some people were collected in the village along the road. He says:—"Soon after, near a *pukka* house, I saw four or five men near the porch-way, all sitting on a piece of wood: about fourteen or fifteen men in front of the house: three had spears I think, all the rest sticks. They attacked Meares and Abbott first; I was behind. I saw a

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man spear Mr. Meares' horse. I think he intended to spear Mr. Meares. Another man struck at Mr. Meares with a stick. He warded off the blow. Three or four men came at me. One man hit me on the thigh with a *lattee*. They struck my horse three or four times. My horse fell in a ditch by the road side, and I was hurt, bruised by the fall. The skin has been taken off my leg; my leg is bruised by the blow of the *lattee*. A Brahmin picked me up and said: 'not this *saheb*; if you want to lick, lick Mr. Meares'; they left me, and followed Mr. Meares to the ghat. I cannot recognize any one of the people who attacked us, or who were at the door. I heard people calling out *mar salako* from the door."

Mr. Francis Abbott says:—"Near a large *pukka* house near the door, four or five men were congregated. I cannot say who they were; some more came from a sort of passage leading to the house. They attacked us; one man attacked me. We rode off. I cannot recognize any one of them. Before we reached the house, a man spoke to my cousin. I do not know what he said. I understand Bengalee very very slightly. I heard a scrimmage behind. I saw Mr. Savi on the ground; I did not see Mr. Meares' horse speared. There was a bush near the door of the house; the men came out of that; two men of the factory were ahead of us."

Jugoo Biswas the ameen says: I was behind the *sahebs* when we reached the house. Kurum was ahead. There is a log of wood near Mohesh Chatterjee's house; on that Mohesh Chatterjee and Madhub Chatterjee were sitting; Ram Churn with some others were near them; near a *poojah* house about ten or fifteen men were collected; two or three had spears, the rest sticks. I heard Mohesh Chatterjee call out *mar, mar*; these men then attacked Mr. Meares. Ramgotee Gorie struck at him with a stick; Mr. Meares warded the blow; Issur Sen thrust at him with a spear; he struck the horse with it. One man named Kurum Sheikh hit Mr. Savi. Ram Churn Chatterjee hit me with a spear. I recognized among the men besides these, Gobind Dass, Gobindo Chatterjee, Huris Biswas. There were other latials whom I could not recognize. There was no dispute at the door. I cannot understand the cause of the row. I have given evidence for the *saheb* before, and have been beaten too."

Kurum tagadageer says:—"I was before the *sahebs*. On arrival at the Baboo's house, four or five people were sitting there. Mo-

hesh Chatterjee, Madhub Chatterjee, Dwarakanath Chatterjee, Gobindo Chatterjee, Ram Churn Chatterjee. I heard Mohesh and others say *mar salako*. Near the bodonghur, a *poojah* place, some ten or twelve men came out with *lattees*, *soorkees*, &c. They set on us. Ramgotee Gorie hit at Mr. Meares with a stick, and Issur Sen with a spear, and struck the horse behind. Mohesh Baboo said, 'not this *saheb*, Meares *saheb*'; I then called, *dohai*." On cross-examination:—"I have given evidence against Mohesh Chatterjee before. Gobind Dass had a spear, Bunwaree also. I was too much afraid to see more."

Kassissur Mookerjee says:—"I was passing to my work through Doorgapore; I met Huris Biswas running from the *kashbarree* towards Mohesh Baboo's house. I asked why he was running. He gave no answer. I afterwards met the *sahebs*, and told them there was a collection of men at Mohesh Chatterjee's house. I had seen the men there as I passed. I saw sticks in the hands of some. I suspected something was wrong, as Suffer Ali and others had lately held meetings with Mohesh Chatterjee. So I told Mr. Meares. Mr. Meares would not listen to me, but went on his road. I turned back with them. I saw Mohesh Chatterjee, Madhub Chatterjee, Ram Churn, and Bunwaree in front of the house. Mohesh Chatterjee said *mar salako*. From the bodonghur ten or twelve men came out with sticks and spears; one Ramgotee struck at Mr. Meares, then Issur Sen thrust at him with a spear, and speared his horse. Mr. Savi, who was behind, was attacked by Kurum Sheikh; his horse fell on him. I saw, besides the two Baboos, Ram Churn Chatterjee, Gobindo Chatterjee, Gobind Dass, Bunwaree, Issur Sen, Kurum Sheikh, Dwarkanath, and others, whom I do not know. Issur Sen, Bunwaree, and Gobindo, had spears. I had a caste quarrel with Mohesh Chatterjee; we do not eat together now."

This is the evidence of Mr. Meares and the factory servants who were with him; it was taken at Doorgapore on the 27th September. The Assistant Magistrate mentions in his judgment that Mr. Hills requested that the evidence of some of the independent villagers, a number of whom were by at the time, might be taken. He said they would not come without a summons. A summons was issued, and Ramchund Roy and Budyanath Chatterjee were examined at Kooshteah on the 27th of September.

In the list of witnesses given by the complainants on the 27th September, are their names, as well as those of Roghomoney Bhuttacharjee, Tarinichunder Chutopadhia, and Oomachurn Banerjee.

Ramchurn Roy says:—"I live at Doorgapore. I am a mahajun. I have nothing to do with the factory. I was present when Mr. Meares' horse was speared on Monday morning—that is, the 11th of Assin. I heard a noise in the road. I saw three *sahibs* on horse-back in front of Mohesh Chatterjee's house. I ran up to see what was the matter. I heard the two brothers Mohesh Chatterjee and Madhub Chatterjee give orders, saying '*mar salako, mar.*' About fifteen or sixteen men with sticks and spears and a lot of village people were there; some one I saw speared the horse. I think it was Issur Sen. I think so, because I saw a spear in his hand. I saw him run up just before I saw the blood coming from the horse. I saw a *sahib* fall. I expect he must have been hit: sticks were lifted, and blows struck. Among the people with sticks and spears, I recognized Issur Chunder, Gobindo Dass, Bunwaree; these had spears: Hurree Biswas, Ram Narain Chatterjee, Gobindo Chatterjee, Ramgottee Gorai, Kurum Sheikh, had sticks. Others were there whom I could not recognize; some of those came out of the *thakoorbari*, which adjoins Mohesh Baboo's house, and belongs to Bissumber Bose. The people I have named are Mohesh Chatterjee's servants. When I saw the *sahibs* coming, I had gone for buying a stamp at Oomachurn's shop. I did not see any laltials or any crowd before I saw the *sahibs*. The stamp shop is less than a *russee* from the house. I was in the shop when I heard the row, and went out."

By the prisoner. "I saw two *sahibs* ahead. Mr. Meares was behind. Mr. Meares fell. I am on bad terms with Mohesh Chatterjee—caste quarrel, and some cases in Court. I have a quarrel with Gobindo Dass." He adds:—"The Baboos were standing by a log of wood by the door. I have never seen the two brothers standing there before." On his evidence being read over to him, he added:—"Some of the people are Mohesh Chatterjee's servants, *viz.*, Gobindo Chatterjee, Hurree Biswas, Bunwaree, Gobindo Dass lives there, Ram Narain Chatterjee."

Buddinath Chatterjee says:—"I live at Doorgapore. I am in the service of Ram Sunker Adhikari, mahajun. I have no connection with the factory. I was sitting in

Oomachurn's (the stamp-vendor's) shop, on Assin the 11th, when I heard a noise and a shouting of *mar, mar*. I went out. I and Taran and Oomeschurn went out. I saw three *sahibs* on horse-back surrounded by men with sticks. I recognized Mr. Meares with a stranger and Mr. Savi. Mr. Meares and the other *sahibs* rode off, the laltials with them. Mr. Savi fell. I went near him. The people said, *yeh sahib hai ne, hai ne*. I saw Mr. Meares' horse bloody. I did not see him struck. I do not know who said *mar, mar*. I was in Oomachurn's shop. I only went as far as where the *sahib* fell. I can't say whether Mohesh Chatterjee was there or not. I recognized Bunwaree and Ramgottee. I forget the others; some had spears; some sticks."

By the prisoners. "Three or four of the men ran after Mr. Meares, when he went away. I can't say whether they came back. I do not know what Ramgottee and Bunwaree had in their hands. Oomachurn's house is about two *russees* from Mohesh Baboo's. I do not eat with Mohesh Chatterjee. My master is not on good terms with Mohesh Chatterjee."

This is the whole of the evidence for the prosecution; the fact that a riot and assault took place is undisputed; the question is, who were the rioters? It will be convenient to consider the cases of the defendants separately.

Issur Sen is a ryot, an inhabitant of Doorgapore. That he was the person who assailed Mr. Meares with a spear and wounded his horse is proved by Kashishur Mookerjee, Jugoo Biswas, and Kurum Jagadageer. Ramchurn Roy proves that he had a spear in his hand. It is not suggested that either of these parties are at enmity with him. His defence was that he was at a village called *Chedamparah*, where he had gone to cultivate *kulave*, and he names three witnesses, Kolarain Mundul, Boidonath Mundul, and Hurro Mundul as capable of proving his allegation. But on the remand neither of them were called. In the same manner it is proved that Ramgottee Gorai, the odman, but at Mr. Meares with a stick, and that Kurum Sheikh, a ryot, inhabitant of Doorgapore, struck Mr. Savi. Ramgottee says, in his defence, that he was selling oil at Mayhootee, and returned about half-past one; he names five witnesses, none of whom are called to prove his *alibi*. Several witnesses for the defence were questioned to show that they did not see him present at the scene of riot. One of

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them, Dwarkanath Mozoomdar, says:—"I know Ramgotee Gorla, who lives at Doorgapore—he was there at the time of the attack. I know him well." He adds:—"I don't think he is a laltial—I never heard any ill of him."

I must, therefore, pronounce the case as clearly proved against these three prisoners. Except the last, Kurum Sheikh, who is a ryot of Mohesh Chunder Chatterjee, they are not shown to be in any way connected with the two Baboos.

Bunwaree Doss, the cook of the defendant Mohesh Chunder, and Gobindo Doss Byragee, a domestic servant of Mohesh Chunder, were recognized by Mr. Meares amongst the men who attacked him. Gobindo Doss is also identified by Jugoo Biswas. Kurum Tagadageer and Kashishur Mookerjee identified both prisoners, and say that each had a spear in his hand, and this is confirmed by the evidence of Ramchurn Roy. Buddinath Chatterjee, who seems to be anything but a willing witness, recognized Bunwaree Doss. Bunwaree's defence was an *alibi*: in support of which he cited five witnesses, and calls none. Gobindo Doss also an *alibi*; he cites five witnesses, and calls none. I think Mr. Meares' attention would be likely to be drawn to the men with spears; and I must pronounce the case, in my opinion, clearly proved as against these defendants.

I come now to the case of Mohesh Chunder Chatterjee. The first question seems to be, was he present at the commencement of the riot? Mr. Meares says, he saw him when he passed the front of the house sitting with his brother Madhub on a log of wood at the door. Mr. Savi does not identify him, but saw four or five men sitting on the log of wood. Mr. Abbott says only that he saw four or five men congregated at the door. Jugoo Biswas and Kurum Tagadageer observed him sitting on the log. Kashishur Mookerjee says he saw him in front of the house. In his own defence, in his petition of the 27th of September, apparently made after he had heard this evidence, he does not suggest that he was not present. He says: "The main object in lodging this false and fraudulent complaint is to harass your petitioner, and to make the ryots of his estate accept indigo advances. The facts are that the plan having been previously concerted, the servants of the prosecutors placed early in the morning ten or twelve clubmen and spearmen in the house of one Kashishur Mookerjee; and no sooner had they (the said servants) come to the scene of the occurrence, ac-

companied by the prosecutor and two other Englishmen, with a view of securing evidence, than those clubmen appeared on the spot agreeably to previous direction; that with the aid of those clubmen they kicked up a row, struck the horse on the back when the prosecutor threw away his hat, and they all ran to the river side, making a loud noise throughout, and a flesh wound was inflicted on that part of the horse's leg, where it might not prove fatal. This wound was inflicted, simply with the view of setting up a false complaint, and making the charge appear a serious one by displaying the wound to the Court." This defendant was in Court before us, and was pointed out by his counsel; and, in my opinion, his personal appearance is such that he would be easily recognized by a person who had seen him once or twice. I have no hesitation in saying that I feel bound to accept Mr. Meares' statement that the Baboo was sitting on the log as the party passed his house, more especially as that allegation appears to me not to be denied by the Baboo himself, whose defence appears to state something which he himself witnessed.

Then, being present, did he take a part in, or abet the riot? Mr. Savi says:—"I heard people calling '*mar mar salako*' from the door." Mr. Meares:—"I heard some one from behind backing them up. I cannot say whether it was the Baboo or not." Jugoo Biswas says:—"I heard Mohesh Chatterjee cry out '*mar, mar*.'" Kurum Tagadageer:—"I heard Mohesh and others say '*mar salako*.'" Kashishur Mookerjee says:—"Mohesh Chatterjee said, '*mar salako*.'" I cannot think that the household servants and dependants of Mohesh Chunder Chatterjee would have taken a part in such an outrage before his eyes, unless at his instigation or with his approval; and, as I think it proved that these servants and dependants did take such a part, I cannot discredit the positive evidence of those who allege that he used the language attributed to him, confirmed, as it appears to me, by other incidents, and the circumstantial evidence in the case. I must, therefore, say that, in my opinion, Mohesh Chunder is guilty.

As only one witness speaks to the part taken by Madhub Chunder Chatterjee, and as there are some inconsistencies in the testimony of that witness, I would give Madhub Chunder Chatterjee the benefit of a doubt whether that witness may be mistaken or may not be speaking the truth, and I would acquit him.

Hurriah Chunder Biswas, a tehsildar of Mohesh Chunder Chatterjee, was recognized by Kurum Tagadageer, who identifies him as the man with a stick in his hand seen by Mr. Meares, who ran towards the village before the attack. Kashishur Mookerjee met him, and, asking him what he was running for, got no answer. Mr. Meares saw him at the door of Mohesh Chunder's house. Juggo Biswas saw him amongst the rioters. Ram Churn Roy saw him armed with a stick. In his defence he alleges that he was during the whole morning occupied in the cutcherry of Mohesh Chunder. He cites five witnesses to prove his *alibi*, but calls none. I pronounce him guilty.

Gobind Chunder Chatterjee, a tehsildar of Mohesh Chunder, is recognized by Juggo Biswas as present with the rioters. Kurum Tagadageer saw him near the door of Mohesh Chunder's house. Kashishur Mookerjee recognized him, and Ram Churn Roy saw him with a stick. His defence is, that he was collecting the rents of Mohesh Chunder's village-majee. He cites four witnesses, but called none. I think it is proved that he was present, but as the evidence of his participation in the riot is very slight, I would give him the benefit of the doubt, and acquit him.

The last case is that of Ram Churn Chatterjee, also a tehsildar of Mohesh Chunder. He is identified by Mr. Meares as having been present. Juggo Biswas says: "He hit me with a spear." Kurum Tagadageer and Kashishur Mookerjee saw him. His defence is that, on the 10th of Assin, Monday, he went by the one-o'clock p.m. train to Kooshtea, and remained at the lodging of his master's mooktear, Ramgoti Mozoomdar, to see about a notice case of his master; that, on the next day, the 11th, at about 10 o'clock, he appeared before the Deputy Collector, Baboo Farrucknauth Mullick, at his sitting, and looked after that case; that at 1 o'clock Mr. Meares came to Kooshtea and filed an information before the Assistant Magistrate; that the Assistant Magistrate went to Doorgapore by the two-o'clock train, where he and the mooktear, as well as the sheristadar of the Magistrate, went together to Doorgapore. He cited four witnesses, and called two. The evidence of his first witness, the mooktear, as taken down, appears as follows: "The day before Mr. Kemble went down in this case for the first time, Ramchurn Chatterjee came to my house (a); returned to his house next day (a) from mine,

where he had been the day before (b); was at my house all night. He came down by the morning train, and went down with the Peshkar."

By Court. — "I went down too. Doorgapore and Telkutt are one village. I had to get some money from my house to pay a mahajun. I am the Am-Mooktear of Mohesh and Madhub Baboos. Ram Churn came up to attest certain papers in an Act X. case, but we could not manage it the day he came, or the day after. The attestations were completed at a subsequent date." The evidence appears quite incoherent, and the Magistrate records "that the witness was somewhat unsatisfactory as to manner. He was more like a trembling defendant than a witness."

The prosecutor, Mr. Meares, offered evidence to prove that Ram Churn Chatterjee went up to Kooshtea in the same train with himself; but as the Assistant Magistrate would not receive it, I can only take it as a suggestion. Certain it is that Ramgoti Mozoomdar went down in the same train with Mr. Kemble. He went to Mohesh Chunder's house, and became security for the defendant's witnesses at Kooshtea.

I believe the evidence of the mooktear to be false, and I find the *alibi* not proved. The facts seem to show that the prisoner probably went to Kooshtea to fetch the mooktear on the 11th.

I would not convict the defendant Ram Churn Chatterjee.

It is unnecessary to discuss the general defence set up by all the accused, and attempted to be supported by the evidence of the witnesses for the defence, that the attack was planned and made by persons employed by the factory. There is not a particle of trustworthy evidence to implicate anybody connected with the factory with the riot.

Had the attack been by ryots of the village, independent of Mohesh Chunder and his party, as suggested, I think that they would not have had the slightest difficulty in bringing home the case to the parties really guilty, and so clearing themselves from the charge. But that has, in fact, never been the case made by the defendants themselves or any of them. Had they adduced evidence to show who the really guilty parties were, it would not have produced any impression in my mind unfavorable to their

(b) Interlined in substitution for the words "next day."

(a) Struck out.

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case, had they mixed up with it an unfounded charge against the factory servants of being privy to a disturbance which took them by surprise. The enmity between the parties might have led to such a suspicion on their part. But when they simply make a charge of conspiracy, and do not support, or attempt to support, it by such evidence as it must have been in their power to produce had they not been themselves guilty, I think that they are not entitled to ask us to disbelieve the clear, positive, and virtually uncontradicted testimony which fixes the guilt upon them. The sentence of six months' imprisonment, and a fine of Rs. 500 on the principal defendant, appear to me a lenient one.

I would affirm the conviction of all the defendants, except Madhub Chunder Chatterjee and Gobando Chunder Chatterjee.

Mr. Justice Glover. The circumstances of this very peculiar case have been so fully detailed in the judgment of the Lower Court, that there is no necessity for my going into them here. It will be sufficient to state that the prosecutor, Mr. Meares, an assistant indigo planter, in the employ of the Messrs. Hills, was, with his companions, Messrs. Savi and Abbott (the latter a relative just arrived from England), set upon in the village of Doorgapore by a number of men armed with spears and sticks. That there was an attack upon these gentlemen in that village, there can be no question; the point to be decided in this appeal is, who took part in it?

But, before entering on this question, an "*in limine*" objection taken by the respondent's counsel, Mr. Evans, must be considered. It appears from the record that Mr. Kemble, the Assistant Magistrate of Kooshtra, before whom the case was first heard, disposed of it adversely to the accused, without summoning or examining the witnesses named by them for their defence. They appealed to the Sessions Judge, who directed the Assistant Magistrate to take this evidence, and to return the papers to him; on their reaching his Court, the Sessions Judge passed sentence, the same as that already recorded by the first Court. Now, on this it is contended on the part of Mr. Meares that the latter proceedings were of the nature of an order in appeal; and that, as they could be called in question at all, it could only be on a point of law, and not on the facts of the case. Mr. Evans also drew the Court's attention to Section 414 of the Criminal Procedure Code, and argued that, as there was no specification in the law of a

case like the one now before us, the above-mentioned section applied and barred the appeal.

With regard to the first point, I observe that Section 444 of the Procedure Code allows an Appellate Court to direct further enquiry to be made, and additional evidence to be taken, and on it "to pass such judgment, sentence, or order as to such Court shall seem right;" in other words, an Appellate Court, under this section, could enhance a sentence if it thought proper. Now, supposing the case to be an ordinary appeal, that Court would not have such power; and it seems to me, therefore, quite clear that an order passed by a Sessions Judge under Section 422 is an original order passed on evidence, which was not before the Lower Court at all, and, as such, is open to appeal, like any other original order on the facts. The fact of the Sessions Judge having passed the same order as the Assistant Magistrate has nothing to do with the question. He did not confirm the Lower Court's order in the proper sense of the term, but imposed a sentence of his own; and the wording of the Judge's decision that "the appeal should be dismissed" was not, in my judgment, a proper one with reference to the sections above quoted.

It is true that, in the Code, no special notice is taken of cases like the present; but I cannot think that the Legislature intended to exclude them. All criminal sentences (save those coming within the limit of Section 411) are once appealable on the facts; and if the result of an Appellate Court's acting under Section 422, and sending for further evidence, is to take the case out of this category, then a Sessions Judge has only to call for further evidence, or to order further enquiry in any case, to do away with the law regulating appeals altogether, and practically to give himself a power of passing original criminal sentences (for he may alter in any way the first Court's order, even to enhancing it, for which, if they are improper ones, there is no redress. I say again that I cannot and do not believe that the Legislature had any such intention; and I think that, as the Sessions Judge in the present case interferred and passed a new sentence on new evidence, his order was appealable on facts as well as on law.

Now to come to these facts. The prisoners have been convicted of having been concerned in some shape or other in a riot, and assault on Mr. Meares and two other

European gentlemen in the village of Door-gapore. The evidence for the prosecution consists of the depositions of Messrs. Meares, Savi, and Abbott, and of five natives, two of whom are much relied on as "independent witnesses."

Mr. Meares states that he identified the prisoners Hurree, Ram Churn, Bunwaree, and Gobindo Chatterjee: he named the Baboos Mohesh and Madhub as being concerned, but did not (in his deposition on oath) say that they were of the number of those who attacked him, nor did he say that they were the persons who called out "*mar mar salako*."

Mr. Abbott identified no one, neither did Mr. Savi, though he deposes to a very singular incident. He states that he was struck with a *lattee* and thrown from his horse, the animal rolling into a ditch in consequence of the assault, and that a Brahmin came and helped him up, saying to the rioters, "Don't beat this one; if you want to beat any one, beat Meares *sahib*." Mr. Savi did not identify this man, which, if the witness Kurum's statement be true, that it was the prisoner Mohesh, is most extraordinary, inasmuch as he, Mr. Savi, had Mohesh before him all the time the case was being investigated by the Assistant Magistrate; and as he had time and sense enough to know that the man who helped him was a Brahmin, he may reasonably be supposed to have been able to identify him as Mohesh, had he really been that man.

The European evidence then amounts to this: one witness identifies four of the prisoners, but cannot state that the prisoners Nos. 1 and 2 were urging them on; the other two prove nothing more than the fact of an assault taking place. I shall allude to this and the other evidence more at large presently.

The so-called independent witnesses were in a stamp-vendor's shop, variously stated by them to be 100 or 200 yards away from the scene of the riot; they depose that they ran out on hearing the *fracas*, and saw the prisoners attack the *sahibs*. Their evidence is opposed on many points to that of the other witnesses, and considering that the assault was over in a few seconds, it is not easy to see how they could have been in time to notice any particulars of the skirmish.

Of the five native witnesses, three, I observe, are not only factory servants, but have special reasons for being inimical to the prisoner Mohesh; and with Mohesh must

be included, for the purposes of this case, all the prisoners, who are, with one exception perhaps, that prisoner's relatives, servants, or ryots.

For instance, Juggo Biswas has given evidence before (against Mohesh) on the part of Mr. Meares, and has, according to his own account, been beaten in consequence. Kurum has likewise given evidence before against Mohesh, and is on bad terms with him. Kashishur has a caste quarrel with him, and both the so-called independent witnesses admit that they are on bad terms with the prisoner. It is singular that only those persons who are named by Mohesh in his petition to the Assistant Magistrate, begging that his witnesses might be examined, as being his bitter enemies, were summoned and examined for the prosecution.

The story for the defence is, that the whole thing was got up by the prosecution itself; that the attack was a sham one, and the men employed in it factory lattials. Witnesses Nos. 9, 10, 11, and 12 depose to the fact of an attack by people whom they did not recognize, and state that the lattials followed the *sahibs* to the ghaut, and crossed it with them.

Three other witnesses depose that the stick-men were either in or came from Kashishur's house, and that there were none near Mohesh's. So far the direct evidence, which, as might be expected, is of the most conflicting nature. The fact is that the importance of this case to either party is not to be measured by its present effects. The prisoner Mohesh notoriously represents the anti-planting feeling prevalent in some parts of Eastern Bengal. He has been mixed up with it in many ways from the first; and it would be folly, in balancing the evidence in this case, to ignore the fact that he would naturally be the man, of all others, whom factory officials, such as *tehsildars*, *ameens*, &c., &c., the direct go-betweens of planter and ryot, would like to see put out of their way. Neither, on the other hand, must it be forgotten that Mr. Meares himself (I quote from the Assistant Magistrate's statement) is a very unpopular man, that he has given great cause of offence to his villagers, and that they "might be expected to attack him any day." That there was some such expectation on the 26th of September, Mr. Meares himself admits. He admits knowing that some of the ryots intended to sow lands which he claimed for indigo with *kulaye*, and on that account asked Mr. Savi (another assistant in the concern

Vol. II. of Messrs. Hills) to accompany him on his visit to the lands in question.

There would seem to be, therefore, one of three hypotheses possible—either that the attack was made, as stated for the prosecution, by Mohesh and his party; or that it was a sham assault got up by the factory amlah; or, lastly, that it was an attack planned and carried out by the ryots whose lands Mr. Meares intended to take or had taken for indigo, and, regarding which, opposition was expected that very morning.

The second of those hypotheses may, I think, be disposed of very shortly, and it is but fair that it should be so disposed of, considering its bearing on the factory officials, at once. The evidence of Mr. Savi distinctly proves that the assault was very far from being a sham. He was struck several times with a *luttie*, and his horse was knocked into the ditch. Factory luttials would hardly have inflicted such injury on one of their masters, nor would one of them have used such words as the Brahmin used in *rescuing* Mr. Savi from his assailants:—"This is not the *sahab*; if you want to beat any one, beat Meares *sahab*." I am quite ready to accept Mr. Savi's statement on this point in opposition to the vague and general allegations of the prisoners' witnesses, and have no doubt that, whatever the true nature of the attack was, the factory had nothing to do with it; and, in justice to Mr. Meares, I think it but right to state my opinion that this part of the defence is absolutely false.

The evidence in support of the first is, as I have before stated, that of Mr. Meares, of the three factory servants, and of the two 'independent' witnesses. The former does not implicate the two Baboos or any of the prisoners, except Nos. 3, 4, 5, and 6, Hurree, Ram Churn Bunwaree, and Gobindo Chatterjee. Mr. Meares states that, on passing Mohesh's house, he saw him and his brother Madhub sitting on a log of wood; that a number of men came from round the corner of Mohesh's house, and attacked him. Of these, he recognized, as above stated, the prisoners Nos. 3, 4, 5, and 6. He says nothing about either of the Baboos having taken part in or abetted the attack; for, though he states that he heard cries from behind urging on the assailants, he does not allege that they were those of Mohesh or Madhub's. In his original statement to the Assistant Magistrate (not on oath) he mentions all six prisoners, 1 to 6, as being of those who attacked him; on his sworn testimony being recorded the next

day, he excludes the two principals from the charge. The omission is singular, doubtless, but I am not disposed to lay much stress on it, certainly not to go the length of the prisoners' counsel, who looks upon it as an attempt to avoid the consequences of giving false evidence.

Messrs. Savi and Abbott, as I mentioned before, implicate none of the prisoners.

The witness Juggo Biswas alleges that he was behind the *sahabs*; that another factory servan, Kurum, was in front when the attack was made—(this, by the way, is distinctly opposed to the other evidence, which makes the two servants precede the Europeans). He deposes to the presence of the prisoners Ramguttee, Issur, Hurree, Gobindo Chatterjee, Gobindo Doss, Ramchurn, and Kurrum Sheikh; he alleges also that Mohesh called out '*mar mar*'; he states further that the prisoners Ramguttee and Issur struck at Mr. Meares, the latter with a spear, which wounded his horse. Kurrum identified Ramgoti, Issur, Kurrum Sheikh, Gobindo Doss, and Bunwaree, and alleges that the man who assisted Savi after he had fallen from his horse was the prisoner Mohesh, and that he used the words "not this *sahab*, but Meares *sahab*," and also urged on the attack by calling out "*mar mar*." This witness, I observe, is the only one who states that the man who assisted Savi was Mohesh, the only one who heard Mohesh use the words "not this *sahab*," &c., &c. Now, as Kurrum was, according to the testimony of all the witnesses, ahead of the party, it would seem strange that he, who was in the most unfavorable position of all for seeing what took place during the assault, should be the only man who saw Mohesh pick up Savi and save him from further violence. Neither Juggoo nor Kashishur, who were both (if their own statements are to be believed) behind, mentions the circumstance, which, had it happened as stated by Kurrum, they could not possibly have failed to see. This man Kurrum too, I observe, excuses himself for not having identified more of the luttials by saying that he was "too much afraid to notice more;" and yet he is the only man who identifies Mohesh amongst the assailants, and that too when Mohesh was behind him! The third witness, Kashishur, the factory tehsildar, was the man who is said to have met Meares on the road, and warned him not to go through the village. He states in his deposition that he turned back with the *sahabs*, and witnessed what hap-

pened. But that he did turn back, is not in the least substantiated; the other witnesses do not mention the circumstance, and neither Mr. Meares nor Mr. Savi, who heard the man's warning, says that Kashishur turned back with them, and was present at the assault. He, however, states that he identified all the prisoners, heard Mohesh and Madhub calling out 'mar mar,' and the others, whom he does not name, as helping on the attack.

These three witnesses, he it observed, all identify the same persons; they depose to the same circumstances (Savi's affair excepted); they are able to distinguish which of the rioters had spears and which *lattes*; to pick out the men who made each particular assault; and all this in the confusion which would necessarily accompany an attack of men armed with deadly weapons, and from which each one of the assaulted party, including Meares himself (who left his comrade helpless on the ground), was trying to escape as speedily as possible.

The assault is said to have taken place on a sudden; in a moment the *sahibs* and their party are surrounded by a mob of armed men; blows are struck and spears used; the assailed run for their lives, and the whole affair is over in a few seconds (this is clearly proved); and yet these three witnesses can find time to identify no less than ten men—men who are running about and attacking different people in different parts of the field, and who happen most strangely to be all the servants or dependants of Mohesh; of the other rioters they could not identify one.

But to come to the general improbabilities in the evidence. Is it likely in the first place that, had Mohesh collected men for the purpose of assaulting Mr. Meares, he would have allowed Kashishur, the tehsildar, to leave the village, and warn him, especially when, if the prosecution evidence be true, he prisoner Hurree was sent forward as a sentinel to give notice of the enemy's approach? Is it likely that Mohesh would thus allow his plans to be defeated? Is it likely again that a man in Mohesh's position, an old Couzdaree Serishtadar, a crafty intriguer like all his tribe, would, supposing he had planned the attack, have shown himself openly directing and encouraging it? Would he too have ordered it to take place immediately in front of his own house, a state of things in which no amount of false swearing could prove an *alibi*? Is it likely that he would detail for the service his own tehsildars, khansamah, and cook? All the

prisoners, with one exception, are Mohesh's servants and dependants—not merely ryots, but personal servants.

Were the evidence for the prosecution stronger than it is, and not forgetting that the story for the defence is, in my judgment, absolutely false, still, looking at this evidence in the light of Indian experience, I should never be able to convince myself that it was true. I have given careful and earnest thought to this case. I have read the evidence over and over again, and come to an unhesitating opinion that it is so improbable, so utterly opposed to all experience of native habits and customs, so irreconcilable with every possible deduction, that no conviction can safely be based upon it.

And it is impossible, in my opinion, to separate the prisoners Nos. 3 to 10 from the Baboos. They are, as I said before, all of them (one perhaps excepted—I say *perhaps*, for the record does not clearly show that he too is not also a dependant) the Baboos' employees and personal domestics. That they would or could have taken part in an attack like the one now under consideration without their master's permission, is not to be believed. If they are guilty, Mohesh is guilty also. If Mohesh is innocent, they are equally entitled to an acquittal.

For the above reasons, I would acquit all the prisoners.

But I think it right to say a few words on what I have above called the third hypothesis, inasmuch as, after the serious charge made by the prisoners against the factory, it may be as well to record an opinion, so far as the evidence enables me to do so, as to what was the real nature of the attack upon Mr. Meares.

Now, it is admitted that Mr. Meares was personally obnoxious to many people; that he had received threatening notices; that his own servants had told him that he ran the chance of being assaulted. He admits himself that he expected a difficulty on the morning of the occurrence, and was astonished at finding the fields intact. My opinion is that, had Mr. Meares gone to these fields an hour or two later, his prognostications would have been verified, and that he would have received there the beating he afterwards underwent in the village. It would seem to me that the ryots (I may observe here that Mohesh is nowhere said to have had any concern with the land in question) were determined to prevent the sowing of their fields with indigo, and to

Vol. II. sow another crop in them; and that they had collected at Doorgapore on the morning in question to carry out their plan—a plan Mr. Meares himself admits to have heard of—and that Kashishur, seeing their determination, and seeing also that his master was making his way towards the village, went out to try and turn him back. Mr. Meares naturally enough refused to be intimidated, went on, and was attacked, as stated, by the ryots who were opposed to his taking the fields in question for indigo.

There was no motive on Mohesh's part to make this attack. He had nothing to do with the lands; and though he might not have

been, and no doubt was, not sorry to see his enemy's discomfiture, he would have taken very different steps to secure the same end. Had Mohesh determined to have Mr. Meares assaulted, the attack would have taken place far enough from his own village, and would have been carried out with the help of hired lattials, and not by the hands of his own servants.

This then was, in my opinion, the real cause of the assault, and I do not believe, nor is there any reliable evidence to support the fact, that it was in any way abetted by Mohesh and Madhub, or carried out by any of the prisoners.

The 30th January 1865.

Present :

The Hon'ble F. B. Kemp, *Judge*.

Cheating and false personation of Public Servant.

Queen versus Sadanund Doss alias Sona Biswas.

Committed by the Assistant Magistrate of Sub-Division Jaypore, and tried by the Sessions Judge of Cuttack, on a charge of Cheating, &c.

The prisoner having passed himself off as a Police Officer, and cheated several villagers out of money, was held guilty of cheating, and falsely personating a public servant.

The prisoner has been convicted of cheating, Section 420 of the Indian Penal Code; and of personating a public servant, Section 170. The sentence passed is rigorous imprisonment for one year for each offence.

The prisoner, pretending to hold the office of head constable of police, and under color of such pretended office, went to some of the villages in the sub-division of Jaypore. The villagers were summoned and reprimanded as to the state of the roads; a small fee was extorted from several of the villagers; and the prisoner's gains would have been much more had it not been for the untimely arrival of the real Police Officer, who exposed the prisoner's assumed character.

There is ample evidence to prove that the prisoner, passing himself off as a Police Officer, cheated several of the villagers out of several sums of money. The act committed by the prisoner had relation to the office which he pretended to hold, for Police Officers are often deputed to enquire into matters of this description; the ryots were deceived, and fraudulently induced to part with their money. The prisoner is, therefore, guilty of cheating and falsely personating a public servant.

I confirm the sentence, and reject this appeal.

The 30th January 1865.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Grievous Hurt—House Trespass.

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Queen versus Bassoo Rannah.

Committed by the Deputy Magistrate of Sub-Division Kilaoraah, and tried by the Sessions Judge of Cuttack, on a charge of Grievous Hurt, &c.

The prisoner entered a house for the purpose of committing an assault, and, in carrying out that intention, caused grievous hurt. In convicting and punishing him for the substantive offence (grievous hurt) *Held* that it was not necessary to pass a separate sentence for the offence of house-trespass.

Mr. Justice Kemp.—This prisoner has been convicted of two offences *first*, voluntarily causing grievous hurt, Section 325 of the Indian Penal Code; and, *second*, committing house-trespass in order to the committing of an offence punishable with imprisonment, Section 451.

It is clearly proved that the prisoner and another were squabbling with the husband and son of the witness, Musst. Mookta, at the door of the house. This witness from inside remonstrated and abused the prisoner; the prisoner then went inside the house, pulled the witness out by the hair of her head, threw her down, and stamped upon her chest and abdomen. The woman was 17 days in hospital, during three days of which the Medical Officer deposes that her life was in danger. The woman alleges that the injuries she received caused a miscarriage; but this is not clearly established. As the life of the woman was endangered, the hurt comes under the eighth head of the hurts which are described as grievous, and the sentence passed under Section 325 may stand; but I think the sentence of imprisonment for six months in addition, awarded under Section 451, should be remitted. The prisoner has been convicted and punished of the substantive offence. The mere entering the house for the purpose of carrying out his intention of assaulting the woman does not appear to me to call for a separate sentence. The papers must be submitted to Mr. Justice Glover.

Mr. Justice Glover.—I concur.

The 3rd February 1865.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Forgery—Committal.

Queen *versus* Dwarkanath Bose.

*Committed by the Deputy Magistrate of Fehana-
bad, and tried by the Sessions Judge of Hoogh-
ly, on a charge of Forgery.*

A Deputy Magistrate cannot commit a person for forgery under Section 170 of the Code of Criminal Procedure, when the Civil Court has sanctioned the prisoner's committal under Section 169, unless with the express sanction of that Court.

This case has been referred to this Court under the following circumstances:—

Certain parties, defendants in a civil suit, pleaded in their answer that the money claimed by the plaintiff had been paid by their father, and, in support of their assertion, produced a receipt. The Principal Sudder Ameen, before whom this case went in appeal, held that the receipt was a forgery, and gave the plaintiff permission to institute a criminal charge against the defendant under Section 169 of the Code of Criminal Procedure.

This section refers to offences against Public Justice described in Sections 193 to 196, 199, 200, 205, 211, and 228.

The Deputy Magistrate committed the prisoners to the Sessions under Sections 467 and 471 of the Penal Code, referable to Section 170 of the Code of Criminal Procedure.

The Judge holds that the Deputy Magistrate had no right to make this commitment, the Civil Court having only sanctioned a commitment under Section 169, and not under Section 170.

We think that the commitment must be annulled. The Civil Court gave its sanction to the defendants being charged with an offence referable to Section 169 of the Code of Criminal Procedure. The Deputy Magistrate, instead of carrying out these instructions, committed the parties under Sections 467 and 471 of the Code, which are referable (Section 407 including Section 463) to Section 170 of the Code of Criminal Procedure, for which he had no sanction.

Supposing the facts of this case to be true, no doubt the defendant might have been convicted under either of these sections; but, as the Civil Court chose to sanction a committal under one of them only, the Deputy Magistrate, we conceive, was not authorized to commit the case under the other. Vol. II.

We, therefore, quash his commitment, and direct him to recommit the parties in accordance with the sanction already given by the Civil Court, or if he think necessary to apply to that Court under Section 170.

The 3rd February 1865.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

**Award of possession under Section 318 of
the Code of Criminal Procedure.**

Queen *versus* Runjeet Molla.

*Committed by the Officiating Joint Magistrate,
and tried by the Sessions Judge of Rajshahye,
on a charge of Criminal Trespass.*

A Joint Magistrate cannot award possession under Section 318 of the Code of Criminal Procedure without making a formal enquiry.

The only point on which this reference is made to the Court is, whether the Joint Magistrate was justified in awarding possession to Durbaso under Section 318 of the Code of Criminal Procedure without making the formal enquiry prescribed by law.

We think that he was not justified, but was bound, under the section above quoted, to record a proceeding, stating his grounds for being satisfied that a breach of the peace was likely to occur in consequence of the dispute, and then to call upon the parties concerned to attend and prove the fact of their actual possession.

This the Joint Magistrate did not do, but decided the question of possession in Durbaso's favor without the previous enquiry which the law holds to be necessary.

We, therefore, annul his order, and direct him to adjudicate the question of possession in a regular manner under Section 318, should circumstances render it, in his opinion, still necessary to do so.

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The 3rd February 1865.

*Present:*The Hon'ble F. B. Kemp and F. A. Glover,
*Judges.***Grievous Hurt (Punishment for).**Queen *versus* Sharoda Peshagur and
Prosunno Peshagur.*Tried by the Officiating Sessions Judge of Jessore on a charge of voluntarily causing Grievous Hurt.*

The offence of voluntarily causing grievous hurt is punishable, not by fine alone, but by imprisonment, the offender being also liable to fine.

The sentence of fine upon these prisoners by the Sessions Judge of Jessore is illegal.

The prisoners have been convicted of voluntarily causing grievous hurt. The punishment for such an offence is imprisonment of either description for a term which may extend to seven years and a fine, not *or* a fine (*see* Section 325 of the Indian Penal Code). Acting as a Court of Revision under Section 405 of the Code of Criminal Procedure, we annul the sentence passed by the Sessions Judge.

It appears that the two prisoners and the injured woman are prostitutes; the three got drunk together and then quarrelled. The witness, Jugut Mohnee, was beaten by the two prisoners; they also stamped upon her chest and abdomen. The Medical Officer deposes that the woman suffered much pain, and was so much injured in the abdomen that her life was despaired of; the offence falls within heading 8th, Section 325 of the Indian Penal Code, and we pass a sentence of one year's rigorous imprisonment on each of the prisoners.

The 3rd February 1865.

*Present:*The Hon'ble F. B. Kemp and F. A. Glover,
*Judges.***Order of Magistrate for removal and reconstruction of roof-drains - Public Nuisances.**Queen *versus* Shabuckram Bukoollee
and another.*Committed by the Deputy Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of Disobedience of Orders.*

Before a person can be legally punished for refusal to remove and re-construct roof-drains, evidence ought to be taken whether the party has disobeyed the Magistrate's order, and that such disobedience has produced, or is likely to produce, harm.

Quære.--Whether such an order under Section 73 of the Code of Criminal Procedure is legal, as that Section refers to public nuisances.

This case has been referred under the provisions of Section 434 of the Code of Criminal Procedure by the Sessions Judge of Hooghly.

It appears that the plaintiff obtained an order from the Magistrate enjoining the opposite party not to repeat or continue a public nuisance under Section 63 of the Code of Criminal Procedure. This order was passed on 6th September 1862. The opposite party sued to set aside this order; but they were unsuccessful. In September 1864, the order was repeated, and the opposite party were directed to remove the roof-drains on the eastern side of their house, and to re-construct them in such a manner as not to injure or inconvenience any party.

The Deputy Magistrate, holding that the opposite party had been guilty of disobedience of this order, has fined them 10 rupees, and, in default of payment, to ten days' simple imprisonment.

We think with the Judge that, before the opposite party could be legally punished, some evidence ought to have been taken that they have disobeyed the orders of the Magistrate, and that such disobedience produced, or was likely to produce, harm (*see* Explanation to Section 158 of the Indian Penal Code). Now, we find that an ameen was deputed to enquire into the matter; he submitted a report and sketch of the house; from his enquiries it is very clear that the opposite party have constructed *puckah* pipes down the side of their house, through which the water from the roof passes into a small drain running along the side of the road, and that no injury is done to any body by this arrangement. We are also very doubtful whether the order under Section 63 was legal, inasmuch as that section refers to public nuisances. In this case, there has, at no time, been any objection, annoyance, or injury to the public.

We annul the sentence passed by the Deputy Magistrate, and direct that the fine be refunded to the opposite party.

The 3rd February 1865.

*Present:*The Hon'ble F. B. Kemp and F. A. Glover,
*Judges.***Attachment of land under Section 3, Act IV. of 1840—Withdrawal of.**

Queen versus Lalla Hurree Hur Pershad and others.

Committed by the Magistrate, and tried by the Sessions Judge of Beerbhoom, on a charge of Breach of the Peace.

An attachment of land under Section 3, Act IV. of 1840, can only be withdrawn by the officer who attached the property.

Read a reference from the Sessions Judge of Beerbhoom, dated 10th January 1865.

It appears that, on the 31st May 1864, the Magistrate of Beerbhoom, under Section 4, Act IV. of 1840, ordered an enquiry with regard to certain property in Deoghur, which was then a sub-division of the said district.

The Deputy Magistrate of Deoghur, within whose jurisdiction the property was situated, attached the lands under Section 3 of the aforesaid Act. It has now been decided by the High Court that the proprietary title is vested in Hoobnarain Singh, who applied to the Magistrate of Beerbhoom to withdraw the attachment, to put him into possession, and to direct the Collector to make over to him the mesne-profits.

The Magistrate of Beerbhoom ordered the attachment to be withdrawn, and the collections to be refunded to Hoobnarain Singh.

The Judge holds that the order is illegal, inasmuch as the attaching officer was the Deputy Magistrate of Deoghur, which sub-division has since been incorporated with the Sonthal Pergunnahs; and, further, that the Magistrate of Beerbhoom has no jurisdiction.

We think that the Judge is right: the application must be made to the Deputy Magistrate of Deoghur, the officer who attached the property.

The 4th February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Murder (by supposed insane person).

Queen versus Arzao Bebee.

Committed by the Magistrate, and tried by the Sessions Judge of Chittagong, on a charge of Murder.

The prisoner was convicted of murder, and sentenced to death. But, before confirming the sentence,

as doubts were entertained of her sanity, the case was referred to the Sessions Judge with instructions for further enquiry.

The prisoner has been convicted of murder under Section 302 of the Indian Penal Code. The Sessions Judge of Chittagong has passed sentence of death, subject to the confirmation of this Court.

The prisoner pleaded guilty, both before the Magistrate and the Sessions Judge. This plea was recorded in the Sessions Court, and she was convicted without taking the evidence for the prosecution. This procedure was strictly legal under the provisions of Section 362 of the Code of Criminal Procedure.

We have read and considered the evidence before the Magistrate. The very peculiar circumstances attending the murder, taken with the fact that the prisoner was sent in by the Police, about a year before the occurrence of the present crime, as a person of unsound mind, induce us to hesitate passing any sentence at all, much less an irrevocable one, until we are fully satisfied that the prisoner was of sane mind, and consequently a responsible agent when she committed the crime with which she is charged; and for the purpose of clearing up this doubt, we return the papers connected with the trial to the Sessions Judge. He is requested to examine the whole of the witnesses in the presence of the Civil Surgeon. That officer must be directed to visit and watch the prisoner for a period not less than one month, and to submit a report, which must be verified, of the result of the enquiries and observations. The Sessions Judge is at liberty to take any further evidence he may deem proper, with reference to the state of the prisoner's mind when she committed the crime with which she is charged. The whole of the evidence thus obtained, with the Judge's opinion, must be submitted for the final order of this Court.

The 6th February 1864.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Grievous Hurt (Punishment for).

Queen versus Menazoodin and Hefazoodin.

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Tried by the Sessions Judge of Jessore on a charge of Grievous Hurt.

The offence of causing grievous hurt is punishable by imprisonment and fine, and not imprisonment or fine.

These prisoners were convicted by the Sessions Judge of Jessore of causing grievous hurt, Section 325 of the Indian Penal Code. The sentence passed was each to pay a fine of fifty rupees, or, in default of payment, to suffer three months' rigorous imprisonment.

The proceedings of this case were called for by Mr. Justice Trevor, on a review

of the Abstract Statement of Sessions trials.

The sentence is clearly illegal. The offence of causing grievous hurt is punishable by imprisonment *and* fine, and not by imprisonment *or* fine. Under Section 405 of the Code of Criminal Procedure, we reverse the sentence; and taking into consideration the facts of the case, and the circumstance that the witness Saduloolla's arm was fractured, we sentence the prisoner to two years' rigorous imprisonment.

The 14th February 1865.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Adultery—Enticing or taking away married woman.

Queen versus Pochun Chung.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Sylhet, on a charge of Adultery, &c.

A person convicted of adultery under Section 497 of the Penal Code need not be convicted also under Section 498; far less where there is no taking or enticing away of the woman.

Mr. Justice Glover.—That the prisoner committed adultery with the woman Hurree, the wife of Gokool, is, I consider, proved. The evidence is quite clear as to the woman's having gone to live with the prisoner; and from the prisoner's own statement to a number of persons who have deposed in this case that he had married Hurree, it may be fairly presumed, as stated by the witness Joba, that cohabitation took place as admitted by both parties to the Deputy Magistrate, though denied at the Sessions. But I do not think that it is either necessary or proper to convict the prisoner under both Section 497 and Section 498. The former provides for adultery of which he has been found guilty; the other for "enticing" for the purpose of illicit intercourse—a charge which, even if proved, would seem under the circumstances of the present case to be included in the more serious crime. I say "even if proved," because the woman herself declares that, being deserted by her husband, she went to the prisoner's house of her own accord.

I would, therefore, annul the conviction under Section 498.

And with reference to the circumstances detailed in evidence, the desertion of her husband, the desire of the prisoner to marry the woman, and the very loose way in which marriages are conducted amongst persons of the prisoner's caste, and which give a certain color of probability to his statement that he had married her without the intervention of a priest, I think that the sentence of two years' rigorous imprisonment is too severe. In apportioning punishment, we must take

into consideration the *status* of the parties. Vol. 22. The present offence which would be a serious one amongst educated people is reduced considerably by the fact that the accused is a low-caste half-savage barbarian, with scarce an idea that he has been doing wrong at all.

I would reduce the punishment to six months' rigorous imprisonment.

The papers must be laid before my colleague, Mr. Justice Kemp.

Mr. Justice Kemp.—All the parties in this case are Chundals, the very lowest caste amongst the Hindoos.

The witness No. 1, Gokool, left his wife Hurree, and went to Cachar in search of service. The woman appears to have been wholly unprovided for. She went to the house of the prisoner of her own accord, and cohabited with him. It was given out to the neighbours and to men of the prisoner's caste that she was his wife. I do not find that the prisoner attempted to set up a marriage in his defence before the Sessions Judge. It is clearly proved that Hurree was married to the witness Gokool. It is also in my opinion established that the prisoner had sexual intercourse with Hurree, and that he knew that she was the wife of Gokool. There was no consent or connivance on the part of the husband; and as the charge was instituted on the part of the husband, the offence of adultery is made out against the prisoner under Section 497. The Judge was certainly wrong in convicting under Section 498, for there was no taking or enticing away of the woman, and, considering all the circumstances of the case, I think that the sentence proposed by my learned colleague is a proper one.

The 17th February 1865.

Present :

The Hon'ble C. B. Trevor and G. Loch,
Judges.

Defamation—Low caste of prosecutor.

Queen versus Nobin Dome, &c.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Beerbhoom, on a charge of Defamation.

A false accusation not made in good faith renders the party making it liable to be charged with defamation.

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The fact that the complainant is a man of low caste, will not debar him from prosecuting for defamation on his being falsely charged with theft.

The Deputy Magistrate's order, under Section 67 of the Code of Criminal Procedure, dismissing the complaint, is altogether erroneous. The prosecutor, says the Deputy Magistrate, is a low man, and the accusation was theft of a goat; and that such an accusation against such a man was a harm under Section 95 of the Penal Code, and not an offence. The Deputy Magistrate has, therefore, dismissed the complaint under Section 67 of the Code of Criminal Procedure.

The false accusation was one against the moral character of the prosecutor, defamatory in its nature, and presumably made with knowledge and intent to harm or injure the prosecutor, and, unless shown to have been made in good faith, renders the party making it liable to be charged with the offence of defamation. The fact that the complainant was a low man, or a man of low caste, will certainly not debar him from prosecuting for defamation on his being falsely charged with theft, and the Court is surprised to find the Deputy Magistrate, who was formerly a Law Officer, ignorant of the elementary fact that all persons are equal in the eye of the law. We remit the case to the Magistrate through the Judge for a full investigation of the case.

The 20th February 1865.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Nuisance—Obstruction of private path—Notice to opposite party.

Queen versus Janokenath Bhuttacharjee.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Tipperah, on a charge of Obstructing a Thoroughfare.

The obstruction of a private path is not a nuisance under Section 308, Code of Criminal Procedure.

Before issue of order by a Deputy Magistrate for the removal of a nuisance, the opposite party should be called upon to show cause why the order should not be enforced.

This case has been referred by the Officiating Sessions Judge of Tipperah, as he is of opinion that the order of the Deputy Magistrate is illegal.

It appears that one Janokenath Bhuttacharjee complained that the path leading to and from his house had been closed by the

opposite party; he asked the Deputy Magistrate to interfere under Section 308 of the Code of Criminal Procedure. The Deputy Magistrate took the deposition of the complainant, and passed the following order—“Let an order be passed to enquire into the circumstances of this case; and further it is ordered that, if the path is really closed, it must be re-opened.”

The police, acting on this order, and finding, as it is stated, that a mat fence had been placed across the path, removed the obstruction.

The opposite party appealed to the Judge, who has submitted the proceedings under Section 434 of Act XXV. of 1861, being of opinion that the Deputy Magistrate's order is illegal, as no notice was issued upon the opposite party to show cause why the order should not be enforced.

The nuisance complained of in this instance does not come under Section 308 at all, for the path, which the plaintiff wishes to have opened, is not a thoroughfare or public place, but a private path leading from the house of the plaintiff to the main village thoroughfare. The Deputy Magistrate therefore was altogether wrong in proceeding under this section. We reverse his order. The plaintiff must seek his remedy in the Civil Court.

The 22nd February 1865.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Defamation (No distinction between written and spoken).

Queen versus Mohunt Pursoram Doss.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Tirhoot, on a charge of Defamation.

The Penal Code makes no distinction between written and spoken defamation.

On the motion of Mr. Allan, pleader for the prisoner, and as the case was a novel one, we called for the record of the trial under the provisions of Section 405 of the Code of Criminal Procedure, for the purpose of satisfying ourselves as to the legality of the conviction and sentence. It appears that Mr. McIver, a Tirhoot Indigo Planter, charged the prisoner and others with the offence of riot. The Judge, while he admitted the *factum* of the riot, doubted the evi-

dence in the matter of the identification of the prisoner and his dependants, and acquitted them. In the course of the preliminary enquiries into the said case, conducted by the police, the prisoner made use of certain words with reference to Mr. Melver, which, on the prosecution by that gentleman under the provisions of Section 500, have been held by the Magistrate and the Sessions Judge in appeal to amount to defamation as defined in the Indian Penal Code. The sentence passed on the prisoner is six months' simple imprisonment, and a fine of Rs. 1000; in default of payment of the fine, further imprisonment for three months.

The words used were in reply to a remark by the Sub-Inspector who enquired into the riot case. That officer observed that Mr. Melver would hardly have brought a false charge against the prisoner. The prisoner then made use of the following language:

"He (i.e., Mr. Melver) has burnt down ten villages in the factory from which he has come, and he will do the same here." The prisoner, though he denies making use of these precise words, admits that he said:

"When you were at Ihmushugger, you burnt the refuse of the Indigo stalks, and then accused Mirian Khan and others of having done so."

The Judge finds that he made use of the first speech, but, for the sake of argument, observes that, even taking the speech to have been as admitted by the prisoner, the offence of defamation was equally made out, and there can, we think, be no doubt that both speeches are defamatory. As the sentence, though perhaps severe, is not illegal, the Court has only to consider whether the conviction is legal or not.

Defamation, as defined by the Penal Code, consists in an injury to the reputation, and no distinction is made between written and spoken defamation. Mr. Melver has lately commenced Indigo speculations in Tirhoot, and, at the time the defamatory words were used, he was building a factory. It is very clear that such a speech in the presence of a large assembly of ryots, who were concerned either as witnesses or parties to the alleged case of riot, was calculated to injure Mr. Melver's reputation as an Indigo Planter; and, further, the prisoner must have well known that his defamatory speech was likely to injure that gentleman's reputation. The imputation was not made in good faith, nor was it necessary for the protection of the interests of the party making it. It does not, therefore, fall under the 9th exception to Section 499 of the Penal Code.

Mr. Aban contends that the principal witness, the Sub-Inspector, before whom the words were used, has not been examined, and that, as he could give the best evidence as to the very words used, no conviction can be had in his absence. But we find that the Judge was satisfied, by the evidence of Mr. Melver and the other witnesses, of the words which were spoken by the prisoner; and, as this is a legal finding on evidence, we cannot interfere.

The offence being defamation within the meaning of that offence as laid down in Section 499 of the Indian Penal Code, and the sentence under Section 500 being a legal one, we see no reason to exercise any of the powers of revision vested in us by the Code of Criminal Procedure.

The conviction and sentence must stand.

The 6th March 1865.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Dacoity with Murder.

Queen versus Ruchee Ahen.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of Murder, &c.

When murder is committed in the commission of a dacoity, every one of the persons concerned in the dacoity liable to be punished with death.

Mr. Justice Kemp.—The prisoner was arraigned on four charges : *1st*, murder ; *2nd*, culpable homicide not amounting to murder ; *3rd*, dacoity ; *4th*, riot.

He pleaded not guilty. The Judge has convicted the prisoner of the offence of dacoity, and has sentenced him to be transported for life.

It is clearly proved that the prisoner and others at night attacked the Kelyan of the witness Patul Kooree, since deceased, for the purpose of robbing the grain. Patul Kooree seized the prisoner, who shouted out to his companions that he had been captured. The prisoner managed to get away from the grasp of the witness Patul Kooree. The prisoner then struck the witness a blow on the head with a club to which an iron head in the shape of an elongated axe was attached.

The prisoner and the other dacoits then made off, carrying with them some grain.

The witness Patul Kooree was sent to the hospital, and died there from the effects of the injury received on the head.

The Judge observes that he does not consider it necessary to go into the question as to whether any act of culpable homicide amounting or not amounting to murder has been committed by the prisoner, inasmuch as the punishment for dacoity meets any sentence to which the prisoner might be liable on the graver charge, with the exception of a capital sentence, which the circumstances of this case did not, in the Judge's opinion, appear to be called for.

I think that the Judge is wrong, and that he ought to have enquired into the question, inasmuch as, if murder was com-

mitted in committing a dacoity, every one of the persons committing such offence might be liable to be punished with death.

It appears to me that the prisoner has been clearly guilty of the offence of murder committed in the commission of the offence of dacoity. The prisoner had got away from the grasp of the witness ; and his using his *latter*, and striking the witness on the head, evinces an intention to take life. I am, therefore, of opinion that the prisoner should have been convicted under Section 396 of dacoity with murder. With the sentence I cannot interfere. It is certainly not too severe under the circumstances of the case. The papers must be laid before my learned colleague, Mr. Justice Glover.

Mr. Justice Glover.—I entirely concur.

The 8th March 1865.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Culpable Homicide not amounting to murder—Grievous Hurt.

Queen versus Megha Meeah, Juckon Meeah.

Committed by the Assistant Commissioner, and tried by the Deputy Commissioner of Cachar, on a charge of Culpable Homicide not amounting to murder, and Escape from Lawful Custody.

When there is neither intention, knowledge, nor likelihood that the injury inflicted in an assault will or can cause death, the offence is not culpable homicide not amounting to murder, but grievous hurt.

Mr. Justice Glover.—That the prisoner struck the blow which caused the deceased's death, is clearly proved by the evidence ; but the offence, as found by the Sessions Judge, is not culpable homicide not amounting to murder, but grievous hurt.

It is proved, and admitted by the Sessions Judge, that the prisoner received provocation at the hands of the deceased, and that the weapon he used, in retaliating, was a light bamboo stick, not more than an inch in diameter, and that the blow was aimed, not at the head, but at the side. It unfortunately happened that the deceased was suffering from diseased spleen ; and a very

Vol. II. slight blow on the region of that organ would have been, in the opinion of the medical officer, sufficient to cause death.

Culpable homicide not amounting to murder supposes that the party inflicting the injury does it either with the intention that it should cause death, or with the knowledge that it may do so, and the offence is modified from murder (which it would be if the above-mentioned knowledge or intention were proved) by the existence of certain exceptions noted under Section 300 of the Penal Code.

When there is neither intention, knowledge, nor likelihood that the injury inflicted will or can cause death, the offence would be "voluntarily causing grievous hurt" under Section 322, or what, under the old law, would have been termed "manslaughter." As the prisoner evidently neither intended the blow struck on the deceased's side to be fatal, nor supposed that it was likely to be fatal, this conviction should have been under Section 322, and not under Section 300.

And, under the circumstances, I consider a sentence of 3 years' rigorous imprisonment for such an assault too severe. I would reduce it to one, and that, with the additional year which the prisoner has to undergo for attempting to escape, will be a sufficient punishment.

The case must be laid before Mr. Justice Kemp.

Mr. Justice Kemp. I concur. There was clearly no intention to cause death or to cause such bodily injury as was likely to cause death, nor was there any knowledge on the part of the prisoner that his act was likely to cause death. The offence of which the prisoner is guilty is voluntarily causing grievous hurt. The sentence proposed by my learned colleague has my concurrence.

The 14th March 1861.

Present:

The Hon'ble F. B. Kemp and F. A. Glover.

Abetment of Theft.

Queen versus Shumeeruddeen and others.

Committed by the Magistrate, and tried by the Sessions Judge, of Backergunge.

A person can be convicted of abetment of theft under the 1st Explanation of Section 107 of the Indian Penal

Code, only if he either procures or attempts to procure the commission of the theft. Mere subsequent knowledge of the offence is insufficient.

The prisoners, Nos. 153, 154, and 155, Sonaullah, Sulleem, and Meerkhan, have been convicted of theft; the prisoner No. 152, Shumeeruddeen, under Section 109 of the Indian Penal Code, of abetment of theft by a servant under Section 381 of the Indian Penal Code, and also, under Section 201 of the Code, of causing the disappearance of evidence of an offence which he knew to have been committed.

With regard to the three first named prisoners, we see no reason to interfere. They confessed their guilt before the Magistrate, and the stolen money was found in their possession.

The conviction of Shumeeruddeen, however, we consider bad on both counts.

The Sessions Judge considers the offence of abetment proved against the prisoner under the 1st Explanation of Section 107 of the Indian Penal Code. But here, we observe, he is clearly mistaken. That explanation states that any one who, by misrepresentation, &c., &c., "procures or attempts to procure a thing to be done," but there is no question that Shumeeruddeen did not procure or attempt to procure the theft to be committed. He only knew of it some days after Aktaruddeen's death, and then there was nothing more than suspicion against the prisoners Sonaullah, Sulleem, and Meerkhan. They had not then confessed, nor had any of the missing property been found in their possession. They did not confess till a long time afterwards, when the police came to make enquiries. We do not, moreover, consider that Shumeeruddeen was in a position that would bind him to take the initiative in informing the police. His master, Afsurdeen, Aktaruddeen's elder brother, was in the house managing the deceased's affairs; and it was for him to give notice to the authorities if he considered that a theft had been committed. The prisoner, as naib, was his servant, and under his orders.

The section on which the Judge has relied will not, therefore, fit the present case. Nor do we think that Shumeeruddeen can in any way be held responsible as regards the alleged theft.

The second charge appears equally untenable. There is no reliable evidence to show that the prisoner caused the memorandum (supposing it to be proof of the theft from the strong box), found in Aktaruddeen's bed after his death, to be made away with. The

witnesses depose generally that, as naib, he ordered the paper to be taken care of, and kept in the serishta of the zemindary; and because it cannot now be found, the Sessions Judge presumes that Shumeeruddeen made away with it.

But why should he have done so? What possible object could he have had? The memorandum did not implicate him in any way; nor was he in the least degree interested in its disappearance. On the contrary, as he had himself accused one of the body servants of the deceased Aktaruddeen of having taken part in the theft, his object would have been to

preserve the paper as a means of proving that, before Aktaruddeen's death, the box had contained so much more money than was found in it afterwards. Vol. II.

That there are many very suspicious circumstances in this case regarding the death of Aktaruddeen, we readily admit; and it may be, as is alleged by the witnesses generally, that Shumeeruddeen was not an honest man, and had misappropriated his employer's funds. But in this particular instance there is neither proof nor presumption against him, and we are clearly of opinion that he must be released.

The 15th March 1865.

The papers have come before this Bench. Vol. II.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Right of private defence of property—Causing disappearance of evidence.

Queen versus Pelkoo Nushyo and others.

Committed by the Magistrate, and tried by the Sessions Judge of Rungpore, on a charge of Culpable Homicide, &c.

A commits no offence, if in exercising the right of private defence of his property against B, whom he finds near a hole in A's house, and, on being attacked by B, he strikes a blow at random, and in the dark, with a stick in his hand, whereby B is killed. C and D, by assisting A in removing the body of B, cannot be convicted (under Section 20 of the Penal Code) of having caused evidence to disappear, they having no knowledge or belief that an offence had been committed, nor any intention of screening an offender.

These three prisoners, who are near relations, were committed to take their trial before the Sessions Judge of Rungpore on the following charges:—

Against Pelkoo Nushyo.—1st. That he committed culpable homicide by causing the death of Kandooram.—Section 304 of the Indian Penal Code.

2nd. That he caused the disappearance of evidence, knowing that an offence had been committed, by concealing the body of Kandooram.—Section 201 of the Indian Penal Code.

Against Ram Mahomed and Mokur Nushyo.—The offence under Section 201 of the Indian Penal Code.

The Sessions Judge finds the prisoner Pelkoo guilty of culpable homicide, and the prisoners Ram Mahomed and Mokur Nushyo guilty of an offence under Section 201 of the Indian Penal Code. Sentence—each to be rigorously imprisoned for one year.

The Judge in the English Department, Mr. Justice Trevor, called for the papers of the case to satisfy himself of the propriety of the sentence.

The Judge, from his remarks, and from the lightness of the sentence, doubtless intended to convict the prisoner Pelkoo of culpable homicide not amounting to murder. He has, however, found him guilty of culpable homicide, which may include the offence of murder, unless the offence be qualified by some one of the exceptions stated in Section 300 of the Indian Penal Code, and none are stated in the calendar. The Judge admits that a burglary was committed in the house of the prisoner Pelkoo by the deceased and another party who has not been arrested; he also admits that there is no evidence as to how the deceased met with his death beyond the admission of the prisoner Pelkoo; but he observes that, by the removal of the body, the prisoner has caused to disappear evidence which might have told for or against him—in his favor for instance, if the medical evidence had shown that the deceased died from rupture of the spleen—against him, if the same evidence proved that the deceased had been more cruelly treated than the fact of his being caught in the act of committing a burglary warranted. The Judge convicts the prisoner Pelkoo of culpable homicide alone, and the two other prisoners under Section 201.

We have read the statement of the prisoner Pelkoo; and as there is no evidence against him beyond his own admissions, which must be taken in their entirety, we are of opinion that he is guilty of no offence.

The prisoner states that a burglary was committed in his house (this fact is admitted by the Judge); that, on his coming out of his house with a stick in his hand, he saw two men close to the aperture made in the *tate*—one of these men made off—the other, the deceased, advanced to attack the prisoner, when the latter struck at him in the dark, but is unable to say on what part of the body of the deceased the blow fell; that, on calling out, his uncle and nephew, the prisoners Ram Mahomed and Mokur, came up; that when they lit a lamp, they found that the man who had been struck by the prisoner Pelkoo was dead; that from fear of a visit from the police they removed the body, and left it in a sugar-cane field about a mile from the house of the prisoner Pelkoo. Taking these admissions as our guide, we are of opinion that the prisoner Pelkoo was exercising the right of private

Vol. II. defence of his property from house-breaking by night. The right of private defence commenced when a reasonable apprehension of danger to the property commenced. Now, it must be admitted that, when a man finds another close to a hole which has been burglariously cut in his house, and further, when that man is attacked by the other party, a reasonable apprehension of danger to the property of the prisoner so attacked existed, such as to justify that person exercising his right of private defence of his property. There was no time to have recourse to the protection of the public authorities. Nor, taking the admission of the prisoner (and there is no evidence beyond these admissions), can it be said that more injury was inflicted than was necessary for the purpose of private defence, for the prisoner states that he struck one blow at random, and in the dark? As, therefore, the prisoner Pelkoo has been guilty of no offence under Section 304, he must be acquitted. He has not been convicted under Section 201.

With reference to the other prisoners who have been convicted under Section 201, we observe that the Section contemplates a knowledge or a reasonable belief that an offence has been committed and an intention to screen the offender. Now, as we have held that the prisoner Pelkoo was guilty of no offence, it may be presumed that the other prisoners could not have had any knowledge or belief that an offence had been committed, nor any intention of screening an offender. It was doubtless wrong to remove the body, but the act was under the circumstances a natural one, and was, in our opinion, caused by the dread which the people at large entertain, and not altogether without reason, of a police inquisition. We acquit all the prisoners, and direct their immediate release.

The 15th March 1865.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Enquiry (definition of)—Breach of the public peace—Possession.

Queen versus Sonaoollah.

Referred under Section 434, Act XXV. of 1861.

Taking the statements of both parties without recording evidence in proof of either, is not an "enquiry."

No enquiry should be made, nor order giving possession to one side or the other passed under Section 318 of the Code of Criminal Procedure save on the supposition that the dispute is likely to cause a breach of the peace.

We think that the Deputy Magistrate did hold that Munnoo was the party in possession, although, as he appears to have taken only the statements of both parties, without recording evidence in proof of either, his proceedings, as the Judge remarks, cannot be called an "enquiry."

And we agree with the Judge that no such enquiry should have been made, and no order giving possession either to one side or the other should have been passed under Section 318 of the Code of Criminal Procedure, save on the supposition that the dispute was likely to cause a breach of the peace.

As there was no such likelihood in the present case, the Deputy Magistrate's order was illegal, and should be cancelled.

The 15th March 1865.

Present :

The Hon'ble F. B. Kemp, *Puisne Judge.*

Commitment by Sessions Judge (of accused person discharged by Magistrate).

Queen versus Sheetaram Chowdry.

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Tirhoot, on a charge of Culpable Homicide, &c., &c.

A Sessions Judge has discretion to order the commitment to the Court of Session of any accused person discharged by the Magistrate. The non-exercise of such discretion cannot be interfered with by the High Court.

The explanation of the Sessions Judge has been considered. It appears to be sufficient and satisfactory. Under Section 435 of the Code of Criminal Procedure, the Sessions Judge has a discretion to order the commitment to the Court of Session of any accused person who may have been discharged by the Magistrate. The Sessions Judge in this case did not think it right to exercise the discretion, and this Court cannot interfere.

The 15th March 1865.

Present :

The Hon'ble F. A. Glover, *Puisne Judge.*

False and malicious charges (made officially by subordinates)—Recusant witnesses.

The Queen *versus* Rhedoy Nath Biswas.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of instituting false criminal proceedings in order to injure.

The mere fact of being in a subordinate position will not hold a man for the consequences of false and malicious charges made by him officially.

Where a recusant witness does not make his appearance, the Magistrate may sell any part of the attached property, and recover the amount of fine imposed on him. The fine is not illegal by reason of the witness's answers to the charge not having been recorded.

This appeal is preferred on the ground of misdirection.

The prisoner is, or rather was, a Head Constable of Police stationed at Bally, and, on the 27th June and 6th of August last, respectively, sent in reports to his immediate superiors that Kuminul Ram and Mochee Ram were in the habit of dealing in stolen goods. The result of these reports was a criminal information before the Deputy Magistrate, who, however, acquitted Kuminul Ram and Mochee Ram, and sent up their accuser to the Sessions, under Section 211 of the Indian Penal Code. The Jury found the prisoner guilty.

It is urged in appeal that the prisoner was a Subordinate Police Officer, and acted in obedience to superior orders, and ought not to be held responsible.

On this, I observe that the criminal information was laid before the Deputy Magistrate entirely on the prisoner's representation to his Inspector. Had it not been for his reports to that official, the charge would never have been made; and the prisoner, although a subordinate to all intents and purposes, was the actual and personal originator of the

charge, and cannot shift the responsibility. I think that the Judge was right in looking to the prisoner alone. If the mere fact of being in a subordinate position is to shield a man from the consequences of official acts originated by himself, no one will be safe from false and malicious charges.

For the rest, the Judge placed all the points of the case very clearly and fairly before the Jury; and they held that the charges were intentionally false, and that there was no ground for the proceedings against the mahajuns.

The only point of law raised in the prisoner's favor is the one noted above, and that being given against him there is no ground of appeal. The appeal is, therefore, rejected.

I notice, in connection with this case, the Sessions Judge's proceedings in the appeal of Ram Koomar Holdar, a recusant witness, who, in spite of summons, proclamation, and attachment of property, refused to appear and give evidence. The Deputy Magistrate punished this man with a fine of 100 rupees; but the Judge reversed this order, on the ground that the appellant's answers to the charge ought to have been recorded, and, not being so recorded, the fine was illegal. This seems to me a mistaken view of the law. Section 190 of the Code of Criminal Procedure provides that, in cases where a recusant witness does *not* appear, the Magistrate may sell any part of the attached property, and thereby recover the amount of any fine that the Magistrate may impose. Taking a witness's answer supposes that the man makes his appearance; but, in the present case, Ram Koomar did not come in, and his defence could not have been taken. The Deputy Magistrate's order was, in my opinion, perfectly legal.

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The 20th March 1865.

Present :

The Hon'ble F. A. Glover, *Puisne Judge.*

False Evidence.

Queen versus Echan Meeah and others.

Committed by the Magistrate, and tried by the Deputy Commissioner of Cachar, on a charge of Perjury.

The making of a false statement, without knowledge as to whether the subject-matter of the statement is false or not, is legally a giving of false evidence.

The appellants in this case (who give no reasons for questioning the Deputy Commissioner's judgment) have been convicted of intentionally giving false evidence in a judicial proceeding (Section 193 of the Indian Penal Code) under the following circumstances :—

One Mahomed Alee had a long standing feud with the prisoners, which was the cause of various complaints preferred by either party in the Criminal Court of the district. It culminated in the prisoner Echan Meeah appearing one day at the thannah, where he accused Mahomed Alee of burglary and theft. The police investigated the case, and found in Mahomed Alee's house a cloth, thal, two cups (*kulloras*), and a pair of tars, which Echan and his witnesses swore to before the Magistrate as being his (Echan's) property stolen from his house at the time of the burglary. The police, I may remark, held the charge to be false; but Echan insisted on the case being sent to the Magistrate, when he and his witnesses deposed as above mentioned.

The Magistrate considered the charge false, and committed all the parties to it for perjury.

The Deputy Commissioner convicted them, and sentenced Echan Meeah, the principal, to seven years' rigorous imprisonment, and his witnesses to four years each.

I see no reason to interfere. With regard to the cloth, the dhobee who washed it has deposed that he was in the habit of marking the clothes of each of his customers with a private mark, and that Mahomed Alee's clothes had one of these marks; that the cloth in question bore Mahomed Alee's mark, as did (a fact proved by actual inspection) the other clothes which were found on

Mahomed Alee's person, and which were confessedly his property. Echan's clothes were marked in a different manner, as was found by inspecting the clothes he wore in Court. Vol. II.

The tars are proved to belong to Mahomed Alee by the man who manufactured them.

The cups, dish, and dhao, which were found in Mahomed Alee's house, are proved to belong to him; and the evidence for the defence in this particular is utterly inconsistent and worthless: as to the tars and cloth, the defence witnesses ignored them altogether.

It is amply proved that all the articles claimed by Echan Meeah belong to Mahomed Alee, and, under the peculiar circumstances of this case, there can be no doubt that Echan Meeah, in swearing to them as his own property, intentionally gave false testimony.

With regard to the other prisoners, they made the false statement, having, in all probability, no knowledge whatever on the subject, one way or the other; still their offence is equally a giving of false evidence under the law, as they could not have believed what they deposed to be true.

I reject the appeals of all three prisoners, and confirm the sentences passed on them by the Sessions Judge.

The 20th March 1865.

Present :

The Hon'ble F. Jackson and F. A. Glover, *Puisne Judges.*

Decision without evidence, illegal.

Queen versus Sheik Edoo.

Reference under Section 434 of the Code of Criminal Procedure on a charge of Theft.

Case quashed as decided contrary to law on the unsupported statements of prosecutor and prisoner, without recording the evidence offered on either side.

This was a reference under Section 434 of the Code of Criminal Procedure by the Sessions Judge of Sylhet, transmitting certain proceedings of the Deputy Magistrate of that district, with his opinion that those proceedings were illegal.

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It appears from the record that a boy named Sheik Edoo was charged by the prosecutor, Mr. Hellen, through his servant Mahomed Nazir, with the theft of two coats, and four other men, whose names were given, with the forcible rescue of the boy Edoo after his arrest by the prosecutor's servant.

The Deputy Magistrate, after some delay, which is not explained on the face of the proceedings, took up the case, recorded the deposition of one Mahomed Nazir, who appeared to conduct the prosecution, and the defence of the boy Edoo, and, considering, for reasons given, the story to be improbable and false, discharged the latter from custody.

The proceedings of the Deputy Magistrate appear to us clearly illegal. He ought to have conducted the trial in accordance with Section 250 of the Code of Criminal Procedure. Instead of that, he took upon himself to discharge the prisoner Edoo, because he thought the circumstances of the case improbable without recording the evidence (that of no less than four witnesses) adduced by the prosecutor in support of his charge. It is not necessary for us to take into consideration the Deputy Magistrate's reasons, for, however valid they might be under different circumstances, and after the requirements of the law had been complied with, they are, as the case stands, based on nothing that can be legally considered as ground for a decision, and are consequently worthless.

To decide a case on the unsupported statements of prosecutor and prisoner, without recording the evidence offered on either side, is, in our opinion, a clear error in law; and, under Section 404 of the Code of Criminal Procedure, we quash the Deputy Magistrate's proceedings, and direct him to take up the case *de novo*, passing such order thereupon as may appear just and proper in accordance with the evidence.

The 20th March 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover,
Puisne Judges.

Evidence—Grievous Hurt.

Queen *versus* Nonkoo Doss and others.

Committed by the Deputy Magistrate of Dur-bunga Sub-Division, and tried by the Sessions Judge of Tirhoot, on a charge of Grievous Hurt.

Evidence to support a charge of grievous hurt.

Mr. Justice Glover.—This conviction appears to me bad. The prisoners are charged with having voluntarily caused grievous hurt to a person unknown under the following circumstances:—

The deceased was, according to the evidence, which I see no reason to disbelieve, caught in the act of theft, and was being beaten and cuffed by all the prisoners, when one of the witnesses for the prosecution threatened to call the chowkeedar, on which they released their captive, who went his way.

The next day he is said to have been found lying in a half-stupified state under a mangoe tree; on being questioned, however, he appears to have got up and walked off. The next day he is found dead in a nullah, which contained, at the spot where the body was found, from one to two feet of water.

The medical report states that the deceased's organs were all healthy; that there were some slight abrasions on the body, and that death was caused by drowning.

This statement is opposed to the evidence, which states that there were a number of marks and scratches on the deceased's body, together with the mark of a blow or kick on the private parts.

Now, in all this I can find no evidence on which to convict the prisoners of voluntarily causing grievous hurt. There is no proof whatever that the man died from the beating, and the fact of there being only a foot or so of water in the place where the corpse was found is no proof that the deceased was so weak that such a small quantity of water would have drowned him, for manifestly he might have fallen in at some other spot where the water was deeper, and have been carried off to where he was afterwards found by the strength of the current.

All suppositions or presumptions consequent on the man's body being found drowned must be put aside, and we must look solely to the nature of the original assault, and see whether it was of a nature to cause grievous hurt.

I do not think that it was. The evidence shows that the man was only cuffed and thumped with hand and fist; that he was on his feet at the time, and not knocked down or jumped upon, and the beating could not have been long continued, as the villagers would have interfered, as indeed they did directly they heard of what was being done. Had the deceased been much injured, moreover, he could not have walked away either

on that day, or on the succeeding one, when he was found under the mangoe tope.

Had the medical officer been examined on oath, as he ought to have been, all doubt as to the manner of the man's death could have been legally set at rest. As it is, the doctor's written note of the case is not evidence.

I agree with the assessors that the offence proved against the prisoners amounts to hurt only, and think that they should be sentenced each to simple imprisonment for four months, with a fine of Rs. 20.

The papers must be laid before another Judge.

Mr. Justice E. Jackson.—I agree with Mr. Justice Glover and the assessors that the evidence does not prove that the defendants were guilty of the crime of causing grievous hurt, and I concur in the reduction of the punishment which he recommends on conviction of the offence of causing hurt.

The 21st March 1865.

Present :

The Hon'ble F. A. Glover, *Puisne Judge.*

Robbery.

Queen versus Dwarka Aheer.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of Dacoity attended with Grievous Hurt.

Theft with violence is robbery.

A conviction, under Section 397 of the Penal Code, is equally good, whether the number of thieves be five or

The prisoner in this case has been convicted under Section 397 of the Indian Penal Code, that is, of using a deadly weapon whilst engaged in the commission of robbery or dacoity. The assessors found that a theft only had been committed; but, as the Judge remarks, theft with violence is robbery; and, under the Section referred to, the conviction would be equally good, whether the number of the thieves was five or under.

I see no reason to distrust the evidence recorded for the prosecution. The prisoner was a fellow villager, well-known to all the witnesses, and they saw the assault at the distance of a few paces.

The defence is altogether unsupported; the two witnesses cited by the prisoner knew nothing of the matter to which they were summoned to depose.

The appeal is rejected, and the order of the Sessions Judge confirmed.

The 21st March 1865.

Present :

The Hon'ble F. A. Glover, *Puisne Judge.*

Dacoity with Murder—Fugitive Offenders.

Queen versus Roopa.

Committed by the Magistrate, and tried by the Sessions Judge of Rungpore, on a charge of Dacoity attended with Murder.

Case of a prisoner who, after having committed dacoity attended with murder, absconded to Bhootan. On the annexation of the Bhootan Dooars by the British Government, he was arrested, and, after conviction, was sentenced to transportation for life.

This is a supplementary trial. The original case, one of dacoity attended with murder, was disposed of by the late Sudder Court on the 11th July 1854, when Beersadoo, one of the principals in the outrage, was sentenced capitally.

Since the annexation of the Bhootan Dooars by the British Government, the prisoner Roopa, who was denounced from the first as one of the men who had murdered the deceased Durreah Doss, and who had absconded, has been living in Bhootan. Several of the witnesses in the case appear to have known of his whereabouts; but, as place of residence was within a foreign territory, they thought it useless to give information. On the Bhootan Dooars becoming British territory, they arrested him.

The evidence against the prisoner appears to me sufficient. He was at one time a servant of Durreah Doss, and had been, shortly before the dacoity, discharged by him for theft. He admits himself that he was in the deceased's service, though, of course, he denies the reason of his being dismissed.

The deceased and his wife Mussamut Neudoo, who still, according to the Sessions Judge's statement, bears about her the marks of old wounds, named the prisoner Roopa, as well as Beersadoo, immediately after they were attacked and wounded (all the witnesses are consistent on this point); and before the police Durreah Doss repeated the accusation on oath, as did his wife. He died before he could depose before the Magistrate.

This, with the other evidence, satisfied the late Sudder Court of the truth of the charge as against Beersadoo, and I think it equally satisfactory against the prisoner Roopa; indeed, the evidence against both persons is precisely the same.

In accordance, therefore, with the recommendation of the Sessions Judge, I sentence the prisoner Roopa to imprisonment in transportation for life.

The 21st March 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover,
Puisne Judges.

Committal of accused without examining him or his witnesses—Procedure when Magistrate has prepared his charge—Witnesses for the defence—Appearance of accused at the Sessions by Mooktear.

Queen versus Hurnath Roy.

Committed by the Magistrate of Backergunge on a charge of an offence under Section 155 of the Penal Code.

It is not illegal for a Magistrate to commit an accused to the Sessions without examining him or his witnesses.

The Magistrate, when he has prepared the charge, is bound to read it to the accused, and to ask him if he wishes to have any witnesses summoned to give evidence on his behalf at the Sessions.

The Magistrate cannot refuse to permit an accused to attend at the Sessions by mooktear.

Mr. Doyne, for the petitioner, contends that the whole of the proceedings of the Magistrate of Backergunge, in the case of his client, prior to the order committing him to the Sessions Court, on the charge of an offence under Section 155 of the Penal Code, have been illegal; that the Baboo was admitted to appear at the preliminary enquiry by mooktears; but that no defence was taken from his mooktear, and the witnesses for his defence were not summoned.

It appears that Baboo Hurnath Roy was at first summoned to appear personally before the Magistrate. But he put in a petition, stating that he knew nothing of the circumstances of the case, while his mofussil agent, who did know all the facts, had been summoned and could explain all; and finally praying

that his attendance at the enquiry before the Magistrate might be permitted by mooktear. The Magistrate at first refused this petition, but subsequently granted it. This was in September. In the month of November the Magistrate examined the witnesses for the prosecution, who were cross-examined; and he also made some examination of all the accused parties then on trial before him, with the exception of Hurnath Roy's mooktear; and he then committed the accused, including Hurnath Roy, to the Sessions, and directed that Hurnath Roy should attend the Sessions in person.

Mr. Doyne now urges that Hurnath Roy was not before the Magistrate at all, but it appears to us that he was present at the enquiry through his mooktear. He may not have appointed any special mooktear to attend on his behalf at the enquiry; but his general mooktear, who had presented the petition, must have been present. It is true that no mention was made of him. But it is not imperative under the law that any examination should be made of an accused; though by its Circular Letter No. 13 of the 28th July last, the High Court has pointed out to Magistrates the expediency of making such examination. In the case before us, however, the question is not whether the Magistrate exercised a proper discretion in the matter, but whether he acted according to law. We cannot interfere, unless he acted illegally; and it is not illegal to commit an accused to the Sessions Court without examining him. Similarly, it is not illegal to commit an accused to the Sessions without examining his witnesses. When the Magistrate has prepared the charge against the accused, he is bound to read it to the accused, and to ask him if he wishes to have any witness summoned to give evidence on his behalf before the Sessions Court. It does not appear that the Magistrate has put this question to Baboo Hurnath Roy's mooktear. But he will at once supply this omission.

The Magistrate, at his discretion, refused to permit Baboo Hurnath Roy to attend at the Sessions by mooktear; and the Judge was of opinion that, under the law, he could not pass any such order. No argument was raised on this point, but we see no reason at present to think the Judge's order wrong.

The Sessions Judge should lose no time in proceeding with the trial of this case.

The 22nd March 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover,
Puisne Judges.

**Negligence with respect to animal—Evi-
dence.**

Queen versus Brojonarain Pubraj.

*Tried by the Officiating Magistrate of Balasore
on a charge under Section 289 of the Penal
Code.*

A conviction under Section 289 of the Penal Code quashed, inasmuch as the evidence did not allude to the negligence of which the accused has been found guilty, and because the evidence was not taken in the presence of the accused.

Mr. Justice Glover.—The records of this case were sent for on the petition of Brojonarain, in order that the Court might satisfy itself as to the legality of the Magistrate's proceedings, and of the order of the Sessions Judge on revision, under Section 434 of the Code of Criminal Procedure, upholding them.

The petitioner was convicted under Section 289 of the Penal Code, and fined Rs. 5.

It appears from the record that a stallion belonging to him broke loose from his syce whilst proceeding through the Balasore bazar, and did some damage to the ponies of a police inspector and constable.

I do not see how Section 289 can be applied to this case. The horse was being led by a syce (and, as there is not the slightest attempt at proving that the animal was a vicious or unruly one, it was immaterial whether that syce was a man accustomed to the horse or not), and broke away from him, frightened, as the petitioner alleges (and the allegation is not denied), by a passing buggy. It appears to me to have been a clear case of accident, and that no negligence can be attributed to the owner in consequence.

The remedy for those whose ponies had been injured by the loose horse lay in the Civil Court.

I think, therefore, that the conviction under Section 289 was not warranted; but, were the facts otherwise sufficient, the Magistrate's order would still have been illegal under Section 194 of the Code of Criminal Procedure, inasmuch as the evidence of the

prosecution witnesses was not taken in the presence of the accused, who had consequently no opportunity of cross-examining them. Vol. 11.

Mr. Justice E. Jackson.—I agree with Mr. Justice Glover that this conviction cannot stand. The evidence does not in any way allude to the negligence of which the Magistrate has found the accused guilty; and that evidence appears to have been taken behind the accused's back. The fine, if realized, must be returned to the accused.

The 23rd March 1865.

Present :

The Hon'ble E. Jackson, *Puisne Judge.*

False Evidence—Omission in charge.

Queen versus Bhuttoo Lalljee and Sheboo.

*Committed by the Magistrate, and tried by the
Sessions Judge of Bhaugulpore, on a charge
of False Evidence.*

Though a charge does not distinctly specify the false statement on which the evidence of perjury is attempted to be established, the omission is not material if the accused has not been prejudiced thereby.

These prisoners have been convicted of giving false evidence, and sentenced to one year's rigorous imprisonment.

The charge does not distinctly state, as I think it should, the false statement on which the offence of perjury is attempted to be established. But I see no reason to believe that the prisoners have been prejudiced by this omission. The proceedings show that the prisoners were, on their trial, aware what statement they were charged with having made falsely. The prisoners were cited as witnesses for the defence by a *gunja*-seller, who had been charged by a police constable with using false scales. The *gunja*-seller admitted that the scales were incorrect, but asserted that they had become so the previous night from a fall, and that the constable had used them against his wishes. The prisoners supported this defence, and denied that the *gunja*-seller used the scales, and they deposed that the constable had carried off the scales, and brought the false charge, because he wanted more *gunja* than he was entitled to.

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It is quite clear that the *gunja*-seller was using false scales, and that the constable, finding he was being cheated, had the *gunja*-seller taken up. The prisoners have given false evidence in support of their brother-shopkeeper, and have been properly convicted.

Reject their appeals.

The 1st April 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover,
Puisne Judges.

Lurking House-Trespass by night—Grievous Hurt.

Queen versus Likhun Doss.

Committed by the Deputy Magistrate of Nagwan, and tried by the Sessions Judge of Midnapore, on a charge of House-breaking by night in order to the commission of Theft.

A prisoner who, in the commission of lurking house-trespass by night, voluntarily attempts to cause grievous hurt to the owner of the house, who tries to capture him, is punishable under Section 460, and not under Sections 457 and 324 of the Penal Code.

Mr. Justice Glover. The prisoner was taken red-handed, and the evidence leaves no doubt of his guilt.

But I do not think that the Sections of the Penal Code, under which the Sessions Judge has convicted him, apply to the case; and so far, therefore, I would amend the Lower Court's order.

The prisoner has been convicted under Sections 457 and 324. Under the first he has been sentenced to ten years' rigorous imprisonment in transportation (Section 59) with a fine of Rs. 10 or further rigorous imprisonment for seven days. Under the last he has been rigorously imprisoned for one day.

This appears to me a very cumbersome way of sentencing the prisoner, the more especially when Section 460 of the Code provides exactly for the offence of which the prisoner has been found guilty. A *sind-kate* is certainly a dangerous weapon; and, if the prisoner did not inflict what can technically be called grievous hurt under Section 320, he evidently attempted to do so, and kept on stabbing at Omapershad until overpowered and deprived of his weapon.

This seems to me to come exactly under Section 460. The prisoner, at the time of committing lurking house-trespass by night,

voluntarily attempted to cause "grievous hurt" to the owner of the house, who was trying to capture him.

I would, therefore, alter the Sessions Judge's conviction from under Sections 457 and 324 to Section 460, and sentence the prisoner to ten years' rigorous imprisonment, commutable to transportation for ten years under Section 59, which, considering the prisoner's antecedents, is not too severe a punishment.

Mr. Justice Jackson.—I concur in the alteration which my colleague proposes to make in the conviction and sentence.

The 3rd April 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover,
Puisne Judges.

Charge under Section 185, Penal Code (by Magistrate and Collector).

Queen versus Gooroochurn Mozoomdar.

Appeal from a decision of the Assistant Magistrate, confirmed by the Magistrate of Tipperah.

Case of a conviction under Section 185 of the Penal Code, on a charge made by a Magistrate and Collector without signing his order as Collector.

Mr. Justice Jackson.—It appears to me that there may have been an error in law committed by the Courts in convicting Gooroochurn Mozoomdar and Anund Chunder Ghose, under Section 185 of the Penal Code, without the sanction of the Collector. But even here it is to be recollected that the officer who ordered the Deputy Magistrate to enquire into the case was both Magistrate and Collector, though he does not appear to have signed his order as Collector. But I would not interfere with the sentences passed, as I think the prisoners have been fairly tried, and are clearly guilty—Anund Chunder Ghose, under Section 169 of the Penal Code, and Gooroochurn Mozoomdar, under Sections 109 and 169 of that Code. It seems to have been proved to the satisfaction of the Deputy Magistrate that the sherishtadar Anund Chunder Ghose was present as sherishtadar at a sale under Act X. of 1859, and that he employed Gooroochurn Mozoomdar to purchase at that sale a jote jumma for him in the name of his sister-in-law, the result being that he bought it at a very small sum, and re-sold it to the defaulter for 113 rupees. Section 15, Regulation II. of 1793, prohibits Anund Chunder Ghose, as sherishtadar, from

purchasing, directly or indirectly, any land which the Collector or his *locum tenens* may dispose of by public sale. Notwithstanding this law, he has made the purchase, and thereby become involved in the offence contained in Section 169 of the Penal Code.

Mr. Justice Glover.—This case was sent for on the petition of Gooroochurn Mozoomdar.

It does not seem to me that there has been any illegality in the Magistrate's order, for, admitting that no charge under Section 185 of the Penal Code would lie without the sanction of the Collector, and that Mr. Pepper sent the case for investigation as

Magistrate, and not as Collector, the sheristadar was clearly obnoxious to Section 169, and the mooktear to Section 169 of that Code; neither of which comes under Chapter IX of the Penal Code, nor consequently under Sections 168 and 169 of the Code of Criminal Procedure.

For the rest I concur in what has been recorded by my colleague Mr. Justice Jackson; and as, whatever I may think of the strength of the case for the prosecution, there appears to be nothing contrary to law in the decision of the Assistant Magistrate or of the Magistrate, I see no reason to interfere, and agree in rejecting the petition.

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The 3rd April 1865.

Present :

The Hon'ble W. S. Seton-Karr, E. Jackson,
and F. A. Glover, *Puisne Judges.*

**Theft by Servant in possession of property—
Criminal Breach of Trust by Public Servant.**

**Queen versus Juggurnath Singh, Purneshur
Dayall, Jowahir Misser, and Kyalee Singh.**

*Committed by the Deputy Magistrate, and tried
by the Sessions Judge of Cuttack, on a charge
of criminal breach of trust.*

The prisoners were charged with having stolen a sum of money shut up in a box and placed in the Police Treasury buildings, over which they, as burkundauzes, were placed in guard. HELD that the charge should have been made under Section 381 of the Penal Code (theft by servant in possession of property), and not under Section 409 (criminal breach of trust by public servant).

Mr. Justice Jackson.—These prisoners are charged with having stolen a sum of money above one thousand rupees, which was shut up in a box, and placed in the Police Treasury buildings, and over which they, as burkundauzes, were placed in guard. The offence for which they have been tried and convicted is that, under Section 409 of the Penal Code, they, as public servants, having been entrusted with property, have committed criminal breach of trust in respect of that property. But the Section in question does not apply to such a case as this. The proper charge against the prisoners is that of theft of the property of their master while being employed as servants, under Section 381 of the Penal Code.

But, in my opinion, the charge of theft is not sufficiently proved against these prisoners. I observe that the assessors acquitted them, but the Judge considered that they were guilty. The Judge has gone most carefully into the grounds on which he holds that the prisoners are guilty, and I have considered them for some time, but cannot satisfy myself that the evidence amounts to more than suspicion of guilt against some one of the prisoners. The prisoners appear to have, according to the usual custom, kept guard one after the other during the night; one man being always awake, the other then asleep. It is admitted by Kyalee Singh, the

burkundauze who was last on guard, and who commenced his guard after four o'clock A.M., that the box containing the rupees was then safe, and was made over to him by Juggurnath Singh, the burkundauze who then went off guard. Kyalee Singh admits that the other then remained asleep. While he was on guard, the lamp went out. It is very evident that the theft really took place at this time, and probably the burkundauze was then asleep, and the thief, after taking the money-box, put the lamp out. Kyalee Singh cannot explain how the lamp went out, which shows that he was then asleep. He afterwards found that there was no light, and went to obtain one from the thannah, but put out the thannah light on trying to light his lamp. Kyalee then returned, found the box gone, and awoke Juggurnath Singh and Purneshur Dayall, and the latter went and brought a light, and then it was clear that the box had gone. While they were talking about it, persons came from the thannah, and began to search about. But the box was not found till several days after, and then on a boat in the river.

The suspicious facts against the prisoners are that the light went out, and the thannah light was put out; and that, when they first discovered that the box was gone, they did not at once arouse the neighbours, but remained quietly searching for it. There is no doubt that all these circumstances amount to some feeling of suspicion that some one of the prisoners had a hand in the crime. But there is no such evidence upon which I can satisfy myself that they are guilty, and deserving of the severe punishment of seven years' transportation, to which they would, in that case, be sentenced. There are clever thieves every where, and my conviction is that the theft occurred while Kyalee Singh slept when the light was put out, and that the thief and the money had disappeared before he awoke. A great deal is said by the Judge of the doors, with the exception of those in the front of the house, having been fastened from inside. But my impression is that the thief got in at the front door, and left by the east door, while the western door was opened to the burkundauzes after the theft was discovered. I would acquit the prisoners.

Mr. Justice Glover.—This case has been sent to me by Mr. Justice Jackson, who proposes to acquit all the prisoners.

The facts are detailed in my learned col-

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Vol. II. league's judgment, and there is no need for me to recapitulate them.

I concur in acquitting Jowahir Misser. It is not denied by the prisoner Kyalee Singh that Jowahir was off guard and asleep when he went for the light, nor that he was still asleep when, on his return, he (Kyalee) found the money-box gone.

With regard to the prisoner Purmeshur Dayall also, although Kyalee says that he awoke him when the lamp went out, this statement is opposed to that of the other constable, Juggurnath Singh, who avers that he only was roused by Kyalee, and that the other two constables remained asleep till after the theft was discovered. There is nothing in my opinion against this prisoner.

I concur also in acquitting Juggurnath. The box was safe when he gave over charge to the prisoner Kyalee; and it is not in the least degree probable that he would have taken advantage of Kyalee's going away for a light to steal the box, break open two doors, fling the box into the river, and return again, all in the space of three or four minutes. The suspicion against him is of the vaguest kind, and is quite insufficient for conviction.

There remains the prisoner Kyalee. Against him there is, I think, that amount of violent suspicion which is sufficient for conviction. When he took the watch, the money, as he himself admits, was safe. It continues so according to his accounts till the light goes out: instead of calling to a comrade at the thannah, which was a few yards distant only, exactly opposite across the road, he goes himself for a light, and by some unexplained awkwardness contrives, instead of getting what he wants, to put out the thannah light also. When he returns, still in the dark, he at once goes into the room where the money had been deposited, and begins to grope about for the box. This, to my mind, is an exceedingly strange phase in the prisoner's conduct. Three or four minutes before, he had seen the box in safety. If I am to believe his statement, he had left a comrade on guard, yet the moment he returns, he commences hunting for the box in the dark. Still stranger, when he discovers the loss, he says nothing about it to superior authority, but remains silent, though he was specially the party to have reported the circumstance, till the angry re-primations of his fellow-constables excite the attention of the inspector at the thannah, who comes across the road to enquire, and then the tale is at last told.

Now, the money was safe when the prisoner went for the light. I take his own statement; and to suppose that an outside thief took advantage of his absence to enter the room and carry off the box, is to suppose that the man had been patiently waiting all night on the look-out for an opportunity which he could never have expected to occur, and that, having got it, he went inside a pitch dark room, the door of which was guarded by a constable, secured the box, opened one of the side doors, and made off with the money, all within the few minutes the constable was away.

I do not say that such a chain of circumstances is impossible; but the facts of this case disclose that amount of violent presumption against Kyalee, that he either stole the money himself whilst on guard, or that he permitted some one to do so, which is sufficient to justify a conviction.

But this conviction should not be under Section 409, which refers to cases of public servants and others having "dominion over property," such as bankers, attorneys, and the like. The prisoner had no dominion over this property—he only had charge of the box which contained it; and I agree with my colleague that the crime here disclosed is "theft" by a servant under Section 381 of the Indian Penal Code, which is punishable by seven years' imprisonment and fine at most.

And, taking all the circumstances of the case into consideration, I think a sentence of five years' rigorous imprisonment sufficient. With respect to this prisoner, the papers must be laid before another Judge.

Mr. Justice Selon-Kaur.—This case has been sent to me on account of the prisoner Kyalee Singh only.

I agree with Mr. Justice Glover in considering the conviction to be a good conviction. Indeed, the hypothesis which would acquit this man does not appear to me a reasonable hypothesis, while the facts and admissions seem to me to amount to far more than mere moral suspicion, and to lead only to the conclusion of guilt.

It is not attempted to be shown that any other persons, save and except the policemen in charge of the box, ever knew of the existence of the money, or had access to the room where it was kept. Two doors, closed at night from the inside, were found open in the morning. The prisoner Kyalee Singh,

as he at last admitted, received charge of the property intact from his predecessor. His own light goes out, and, in endeavouring to get his lamp re-lit at the thannah a few yards off, he manages to put out the lamp at the latter place also. On his return to his post, he at once begins to grope about for the box, does not find it in its place, and yet gives no alarm.

If we believe this story, we must believe it with all its improbabilities; and we must further suppose, without one title of evidence, that in that brief interval some unknown thief, who had by some extraordinary means previously become acquainted with the existence of the money and the position of the box, had noiselessly got into the room, and had made off with his booty.

I hold that, on the unimpeached evidence as to the placing of the box in the room in question, and to its disappearance and to the other facts, the explanation of the prisoner is so incredible that the two circumstances together leave no reasonable doubt of the validity of the conviction.

Concurring with Mr. Justice Glover, I sentence this prisoner to five years' rigorous imprisonment. My colleagues have decided that the conviction should be under Section 381, and not under Section 409.

The 1st April 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover,
Puisne Judges.

Commitment (Annulment of)—Compromise.

Queen versus Salim Sheik.

Referred under Section 334, Act XXV. of 1861.

A commitment, once made by a Magistrate to the Sessions, cannot be annulled by his allowing the prosecutor to file a compromise.

Mr. Justice Jackson. The Cantonment Magistrate seems to have considered it necessary to draw out a charge against the prisoners before he examined them, and he does not seem to have been aware, when he took their answers on the charge, that he was thereby committing them to the Sessions. However this may be, the Cantonment Magistrate, after he had committed the prisoners for trial under Section 226 of the Pro-

cedure Code, had no authority to quash the commitment. His order accepting a razeenamah and safeenamah is without jurisdiction, and consequently void. The Sessions Judge should fix a day for the trial of the prisoners before him, and direct the Magistrate to have all the parties in attendance on the date fixed by him. As regards the persons against whom the Sessions Judge thinks proceedings ought to be taken, he can apply the provisions of Section 435 of the Procedure Code.

Mr. Justice Glover.—There can be no doubt that a commitment, once made by a Magistrate to the Sessions, cannot be annulled by the former allowing the prosecutor to file a compromise. Such case, moreover, must go to trial when once committed, however incomplete the original investigation may have been.

But if this investigation be found to be incomplete, the Sessions Judge has the remedy in his own hands, and can summon and examine any witnesses he thinks proper under Section 367 of the Criminal Procedure Code.

There appears to be, therefore, no necessity for quashing the Joint Magistrate's commitment, as his investigation, though it may have been unsatisfactory, has certainly not

The reason given by the Joint Magistrate for accepting the razeenamah is untenable. Basiruddeen, having once on oath charged the accused parties with a crime cognizable by the Court of Session, must be bound over to prosecute. He cannot now withdraw his charge, except at the expense of his recognizances. For the rest, I concur with Mr. Justice Jackson.

The 3rd April 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover,
Puisne Judges.

Amends—Theft.

Queen versus Gogun Sein and others.

Reference under Section 434, Act XXV. of 1861.

Amends cannot be awarded for a false charge of theft.

It has been frequently ruled by this Court that "amends" can only be awarded in respect of cases coming under Chapter XV. of the Code of Criminal Procedure; and, as

- II. the case referred by the Magistrate was one of theft under Section 379 of the Indian Penal Code, the order of the Deputy Magistrate was illegal, and should be quashed.

The 5th April 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover,
Puisne Judges.

Explanations of prisoners (Filing of)—Transfer by High Court of a case from one Magistrate to another.

Queen versus Kisto Chunder Ghose.

Appeal for the transfer of his case from the file of the Deputy Magistrate of Diamond Harbour to that of any other Officer.

A Magistrate is bound to file with the record any explanation that a prisoner wishes to make.

It is only where there is reason to suppose that the prisoner will not have a fair trial, that the High Court will transfer a case from one Magisterial Officer to another.

We see no reason to alter the former order* passed on this application.

The Deputy Magistrate showed a great want both of temper and discretion in dealing with the petitioner's written statement; and his explanation is not, the Court considers, satisfactory. The Deputy Magistrate was bound to file with the record any explanation the petitioner wished to make.

But, admitting all this, we do not see in it any sufficient reason for supposing that the man will not have a fair trial, and it is only in cases where circumstances tend strongly to such a conclusion that this Court would exercise its authority in transferring a case from one Magisterial Officer to another.

The petitioner will be directed, therefore, to appear at once before the Deputy Magistrate, who will take up the case, and dispose of it as speedily as possible, taking care to summon such of the witnesses named by the petitioner in his written statement as the latter may wish to have examined.

The 10th April 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover,
Puisne Judges.

Answers of accused.

Queen versus Poresh Narain Roy, Rookince Debea, and Bukteshury Debea.

* No. 231, to the Sessions Judge of the 24-Pergahs, dated 15th March 1865.

Referred under Section 434 of the Code of Criminal Procedure, and Circular Order of 15th July 1863.

An order of fine quashed, as made without the answers of the parties fined being taken to the offence charged.

The Sessions Judge is of opinion that the Joint Magistrate's order, under Section 174 of the Penal Code, is illegal, and should be set aside. It appears that the Joint Magistrate served summonses under Section 252 of the Procedure Code, calling upon certain parties to show cause why they should not enter into recognizances to keep the peace. Those parties did not attend on the day fixed for their attendance by the summons. The Joint Magistrate then issued warrants to enforce their attendance. Upon this they all appeared by agent, and expressed their readiness to enter into recognizances, and were ordered to give them. But the Joint Magistrate on the same day took the answers of the above persons' agents, as to why they had not appeared on the day originally fixed in the summons. The reply was that the agents had received no instructions to attend. Upon this the principals were fined Rs. 50 each. The Joint Magistrate did not put the persons whom he has fined upon their answers to the charge; and the agents were not asked to explain why the principals had not been present. The principals were fined without their answers being taken to the offence for which they were punished. The fines in question must be remitted, and, if paid, returned to the parties.

The 10th April 1865.

Present:

The Hon'ble E. Jackson, *Puisne Judge.*

Dacoity—Award of portion of fine to complainant.

Queen versus Bissonath Mundle, Srimunt Mundle, Chinibash Tatee, Koonjo Bagdee, and Ishen Paul.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Moorshedabad, on a charge of Dacoity.

The Sessions Judge should record under what Section, or on what grounds, he orders a portion of the fines inflicted on prisoners convicted of dacoity to be made over to the complainant.

I have read the charge of the Sessions Judge to the jury in this case, and the grounds upon which the several prisoners

appeal. They do not allege there has been any illegality in the procedure of their trial, or in the sentences passed upon them. But they urge that the accomplice denounced them through enmity, and that his evidence is not sufficiently corroborated. It is clear from the Judge's charge that the evidence of the accomplice is very strongly corroborated on many points *viz.*, by other evidence showing that the prisoners were together on the night of the dacoity, and by their own confessions, in which some of them pointed out the exact spot where the dacoits assembled and how they acted. The jury, on this evidence, has found the prisoners guilty, and their verdict is final. The Sessions Judge should have recorded under what Section or on what grounds the sum of Rs. 300 out of the fines inflicted on the prisoners was ordered to be made over to the complainant.

The 10th April 1865.

Present :

The Hon'ble G. Campbell and E. Jackson,
Puisne Judges.

Hurt—Grievous Hurt—Right of private defence.

Queen versus Sohun and Samoo.

Tried by the Sessions Judge of Patna on a charge of causing Grievous Hurt.

In cases of hurt or grievous hurt, the question should be considered as to who was the aggressor, and whether the offence was committed in the exercise of the right of private defence.

Mr. Justice Campbell.—This is a trial by jury, and the only question is whether the Judge has rightly charged the jury. I think there is an error in the charge. He makes the question to be whether the prisoners acted on grave or sudden provocation, whereas it seems to me that the real question was whether they, in any way, exercised a right of private defence. As usual, they pleaded neither sudden provocation nor private defence, alleging an *alibi*; but the one would come under judicial notice as well as the other. I observe that, in these affray cases, there is generally far too much neglect of this question of private defence. The injury is generally solely directed to the question who struck the blow—not to the question who was in the wrong in the original subject of quarrel. This seems to me quite a mistake. The essence of the case should be, I think, to ascertain who was the aggressor,

and whether a party acted in right of defence or otherwise. It never was intended that a man should submit to the deprivation of property in his possession without exercising any right of self-defence, and trust to recover it by the tedious operation of a case in the Civil Court, with all the weight of possession, *onus* of proof, &c., against him. Generally, as I said, this point is neglected. But in this case it appears most distinctly from the Judge's charge (as well as from the evidence) that the prisoners were in possession of the disputed property, and that there was, on the part of the prosecutors, "an attempt to oust them from the occupation of a certain piece of land, and a direct interference with this building." Again, "no doubt the attempt to oust was a provocation;" "it involved a question of title for the adjudication of which proper Courts are appointed, and there was nothing to require instant assertion of the prisoners' rights." Now, as I said, a future remedy in a Civil Court is a very different thing from possession, and there are no Courts or authorities which would have protected the prisoners' possession if they had not helped themselves. It seems to me clear that the prosecutors committed a criminal trespass on property in possession of the prisoners; that prisoners, finding themselves about to lose possession, got swords and used them to the extent of slightly wounding two of the trespassers in the hand. Now, the Penal Code, Section 104, extends the right of private defence of property against criminal trespass to any harm other than death, provided the property could not be defended otherwise than by causing such harm. The point would be whether prisoners used more violence than was necessary. I think the questions should have gone to the jury whether the acts of the prisoners were acts of private defence within that definition. If the prisoners had no alternative but either to lose the possession of the property, or wound the trespassers as they did, they would be entitled to an acquittal. Perhaps we might remand the case for a new verdict under the above directions.

Mr. Justice Jackson. I concur, for the most part, in Mr. Justice Campbell's remarks, more especially as respects the constant omission in Sessions Judges to consider the question of whether the offence of hurt or grievous hurt has been committed in the exercise of the right of private defence. In this case the complainant's witnesses all admit that Megher Singh was the last

Vol. II. occupant of the house which the prisoners were rebuilding, and that the prisoners had been for ten days engaged in erecting the walls of the house, when the zemindar of the village, Shubdayal, opposed them; and Megher Singh has himself deposed that the prisoners were rebuilding the house with his consent. I think, then, that any assault which the prisoners might have then and there committed in order to protect their possession of the property, might certainly have been justified under the Sections of the Penal Code which acknowledge the right of private defence. But this right could hardly extend to the act of the prisoners in going to their own houses, and returning armed with swords and using them. It could hardly be said that this was not inflicting more harm than was actually necessary for the purpose of defence. I would not then return the case for a new trial. But, accepting the verdict of the jury, and considering the provocation which the prisoners received, and their right of private defence, which, after all, they have not exceeded to any large extent, I would reduce the sentence to three months' simple imprisonment.

Mr. Justice Campbell.—I think the ends of justice will be sufficiently met by the reduction proposed by my colleague in the sentence, which, under the circumstances, is clearly too severe. I therefore concur in the order proposed by Mr. Justice Jackson.

The 10th April 1865.

Present:

The Hon'ble F. A. Glover, *Puisne Judge.*

Jury—Misdirection.

Queen versus Seetanath Ghosal.

Committed by the Deputy Magistrate of Diamond Harbour, and tried by the Sessions Judge of the 24-Pergunnahs, on a charge of False Evidence.

There is no misdirection in a case of false evidence on a Judge pointing out to the jury the contrast between the evidence for the prosecution and the course followed by the prisoner (namely, a simple denial of the charge, coupled with a refusal to examine the witnesses in attendance), so long as the Judge left it to the jury to decide between the opposing statements, and to credit whichever they thought most worthy of belief.

This is an application to have the verdict of the jury in the case of the *Queen versus Seetanath Ghosal* set aside on the ground of misdirection.

The misdirection complained of is that the Judge unduly pressed upon the attention

of the jury, and recommended them to adopt the evidence for the prosecution, and refused to allow the jury to visit the spot where the tree in dispute had stood, and so prevented them from coming to a right conclusion.

I have read over carefully the Sessions Judge's charge, and find no undue pressure laid upon the jury. The Sessions Judge commented on the evidence for the prosecution, and contrasted it with the course followed by the prisoner (a simple denial of the charge, coupled with a refusal to examine the witnesses who were in attendance). I think he was quite right to point out the contrast, so long as he left it to the jury, which the Sessions Judge did, to decide between the opposing statements, and to credit whichever they thought most worthy of belief.

With regard to the second objection, the prisoner was charged with using certain words (which are stated in the calendar) on oath, knowing them to be false. These were that Dr. Mazzuchelli threatened to cut down the tree to establish a butcher's shop on the spot, &c., &c. Manifestly it could not have assisted the jury, in determining whether this charge were true or false, to have visited the spot, and have seen the condition in which the remains of the tree were, inasmuch as the gist of the case was not so much whether Dr. Mazzuchelli had the tree cut down, as whether he used the improper language attributed to him by the prisoner. The jury had to decide between two statements, and they, on the evidence, held that Dr. Mazzuchelli and his witnesses spoke the truth, and consequently that the prisoner had perjured himself.

I think, therefore, that there was no misdirection on the part of the Sessions Judge, and that this application should be rejected.

The 13th April 1865.

Present:

The Hon'ble C. B. Trevor and G. Loch,
Puisne Judges.

State Offences—Jurisdiction—Trial of British Subject for acts done within or without British Territory.

Queen vs. Moulvie Ahmudoollah.

Mr. H. A. Eglinton and Baboos Kishen Kishore Ghose and Jagadanund Mookerjee for the prosecution.

Mr. W. L. Mackenzie for the defence.

A person who is admittedly a subject of the British Government is liable to be tried by the Courts of this

country for acts done by him, whether wholly within or wholly without, or partly within and partly without, the British territories in India, provided they amount together to an offence under the Penal Code.

The prisoner is charged on the following counts:—

1st.—That he attempted to wage war against the Queen, and thereby committed an offence punishable under Section 121 of the Indian Penal Code.

2nd.—That he abetted the waging of war against the Queen, and has thereby committed an offence punishable under Section 121 of the Indian Penal Code.

3rd.—That he has abetted the attempt to wage war against the Queen, and has thereby committed an offence punishable under Section 121 of the Indian Penal Code.

4th.—That he abetted the collection of men with the intention of waging war against the Queen, and has thereby committed an offence punishable under Sections 109 and 122 of the Indian Penal Code.

5th.—That he, by illegal omission, concealed the existence of a design to wage war against the Queen, intending by such concealment to facilitate the waging of such war, and has thereby committed an offence punishable under Section 123 of the Indian Penal Code.

The Judge has found the prisoner guilty on the 2nd, 4th, and 5th counts. He acquits him of the first count, and considers the 3rd merged in the 2nd. The Judge has passed a sentence of death and forfeiture of property on the prisoner, which sentence is submitted for the confirmation of this Court under Section 380 of the Code of Criminal Procedure, and the prisoner has filed an appeal against the finding and conviction under Section 408 of the same Code.

The counsel for the prisoner raised a legal objection that the prisoner had not committed an offence punishable by the Penal Code; that on reference to the remarks made by Morgan and Macpherson in their edition of the Penal Code, and to the illustrations appended to Section 121 of that Code, it was clear that the words "waging war" meant an insurrection or rebellion within the British territories, and had no reference to a war waged by foreign enemies, or by parties owing allegiance to the Queen, if such war were waged outside of the British territories. The prisoner had been acquitted on the first count; and the counsel contended that, if the view of the law which he took were correct, the prisoner could not be convicted of abetment under the 2nd, or on any other count

of the charge, as the war had not been waged within the British territories. And that, even if assistance had been rendered (an allegation by no means satisfactorily proved against the prisoner), it had been given to parties not within the territory, and it was therefore immaterial whether such parties were foreign enemies, or persons owing allegiance to the Queen.

The contention of the learned counsel for the prisoner cannot, we think, be sustained. The prisoner is admittedly a subject of the British Government. By Section 2 of Act 1, of 1849, which is still in force, he is amenable to the law for all offences committed by him within the territory of any foreign Prince or State; and, by Section 3 of the Penal Code, he is to be dealt with according to the provisions of the Code for any act committed beyond the territories vested in Her Majesty by the Statutes 21 and 22 Vic., Ch. 106, in the same manner as if such act had been committed within the said territories. Whether, therefore, the acts which the prisoner did were wholly within or wholly without, or partly within and partly without, the territory of Her Majesty, if they together amount to an offence under the Penal Code, he is liable to be tried for them by the Courts of this country.

We think that the evidence before us is sufficient to support the conviction of the prisoner under Section 121 of the Penal Code upon the second count of the charge; but, as we do not find from that evidence that the prisoner took a more active part in this conspiracy than others who have been convicted and sentenced, we decline to confirm the sentence of death passed by the Sessions Judge, but direct that the prisoner Ahmud-oollah be transported for life, and do forfeit all his property to Government.

The 18th April 1865.

Present:

The Hon'ble F. A. Glover, *Puisne Judge*.

Kidnapping or abducting a woman to compel her marriage—Consent of girl under sixteen years.

Queen versus Amgad Bugeah.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Tipperah, on a charge of kidnapping under Section 366 of the Indian Penal Code, &c.

The consent of a girl under sixteen years, kidnapped or abducted to compel her marriage, does not affect the

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Vol. II. offence; nor is it necessary that the taking or enticing should be shown to be by means of force or fraud.

This is a very clear case.

The girl, who is under fourteen years of age, deposes that the prisoner met her on the road, and carried her off forcibly to his house, with the intention of marrying her. That she was so taken to the prisoner's house is proved by the evidence, and it was in that house that the police found her.

The defence is that the girl married the prisoner of her own accord, and that her brother agreed to the arrangement; but this statement is totally unsubstantiated, the per-

son who is said to have performed the marriage service denying all knowledge of the transaction.

But, even supposing so much of the defence true that the girl did consent, that circumstance would not affect the present charge. It is proved that the prisoner either took or enticed her, she being a girl under sixteen years of age, from the keeping of her lawful guardian, and the consent of such kidnapped person would be immaterial; nor would it be necessary that the taking or enticing should be shown to be by means of force or fraud.

The appeal is rejected.

The 19th April 1865.

Present :

The Hon'ble F. A. Glover, *Puisne Judge*.

Theft, and taking or retention of stolen goods.

Queen versus Sreemunt Adup.

Committed by the Deputy Magistrate of Howrah, and tried by the Sessions Judge of Hooghly, on a charge of Theft, &c.

The theft and the taking and retention of stolen goods form one and the same offence, and cannot be punished separately.

This case was tried with the aid of a jury, and there is consequently no appeal except on points of law.

I think that the Sessions Judge's charge might have been more carefully worded. For instance, he speaks of the theft, of the finding of the bag, and of the consequent arrest of the prisoner with that bag, as being "admitted." Now, the only meaning that could possibly be attached to these words would be that the prisoner "admitted" the facts referred to, whereas he did no such thing. The jury ought to have been told that these circumstances were deposed to by such and such witnesses.

This, however, does not amount, under the circumstances of the case, to a misdirection.

For the rest, the evidence, such as it is, was laid before the jury, and they thought proper to convict upon it. This evidence might have been unsatisfactory, but it was legally sufficient, and that is the only point I have to do with in considering this appeal.

I must reject it, therefore; but the prisoner ought not to have been convicted on the 2nd and 3rd counts of the charge. As he has been found guilty of the original theft, the taking of the bag of pice from the place where it had been concealed in the plantain clump was part and parcel of that crime, and ought not to have been made into a separate and distinct offence.

So likewise with regard to the conviction of "knowingly retaining stolen property." It has been frequently ruled by this Court that in cases like the present the theft and the retention of the stolen goods form one and the same offence, and cannot be punished separately.

The 19th April 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover, *Puisne Judges*.

**Whipping (in addition to imprisonment)—
House-breaking by night and Theft.**

Queen versus Tonaokoch.

Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated 15th July 1865.

Section 3, Act VI. of 1864, does not allow of whipping in addition to imprisonment in the case of a fresh conviction.

House-breaking by night and theft form a single and entire offence, and cannot be punished separately.

The Officiating Deputy Commissioner has mistaken the meaning of Section 3, Act VI. of 1864, and has sentenced the prisoner to stripes in addition to imprisonment, although no previous conviction for the same offence had been recorded against either of them.

So much of his order is, therefore, cancelled.

The Court desire the Judicial Commissioner to bring the subject of this reference to the notice of his subordinates generally; and also to draw their attention to the Circular Letter of this Court, No. 926, dated October 3rd, 1864, wherein is laid down that, if a man break into a dwelling-house at night and steal property therefrom, the crime is in its nature one single and entire offence, and should be treated accordingly. The Assistant Commissioner should have convicted the prisoner under Section 457 only.

The 20th April 1865.

Present :

The Hon'ble F. A. Glover, *Puisne Judge*.

False Evidence—Corrupt intention.

Queen versus Rhutten Ram.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of false evidence.

Corrupt intention in giving false evidence may be inferred from circumstances.

The facts of this case are not contested. The prisoner now admits that he did realize

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Vol. II. money on two decrees, and defends himself by saying that, when originally examined, he was confused, and did not know what he was saying.

The circumstances under which the false evidence was given are fully detailed in the Sessions Judge's proceedings; and the only question for the Court to consider is, whether the statement on solemn affirmation, to the effect that he had only realized on one decree, and not on two, was false evidence intentionally given.

Corrupt intention may be inferred from circumstances; and those detailed in the Lower Court's judgments are, I consider, sufficient to warrant the inference.

The prisoner had every reason to conceal the fact of his having realized more money belonging to the minor's estate; and as to his plea of being confused at the time the question was put to him, I remark that he was allowed several opportunities of telling the truth, and that the realization of the amount due on the second decree formed the subject of a conversation in Court before the question was actually put to the prisoner. He had ample time to correct himself, and he could hardly have forgotten the circumstance that he had received money on account of the second decree on no less than three different occasions, on all of which he gave a receipt for the money realized. I see, therefore, no reason to interfere, and reject the prisoner's appeal.

The 21st April 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover.
Puisne Judges.

Joint Magistrate vested with full powers (not subordinate to Magistrate)--Disputes concerning right of way (Procedure).

Queen versus Toyluckonauth Sircar.

Referred under Section 434, Act XXI. of 1861, and Circular Order dated the 15th July 1863.

A Joint Magistrate vested with full powers is not, *quoad* cases instituted before and tried by him, subordinate to the Magistrate; and the latter officer has no power to quash his proceedings or to hear them on appeal.

In a case of dispute concerning a right of way, the Magistrate, instead of deciding against the complainant on the ground that he already has another way of approach to his own house, ought to enquire whether or not the new road has been in the use and occupation of the complainant, and, if so, to retain him in it, leaving the owner of the land to determine the question of right to the easement in the Civil Court.

Section 320 of the Code of Criminal Procedure does not require that there should be an apprehended breach of the peace before the authorities can interfere to decide a right of way.

This case has been referred under Section 434 of the Code of Criminal Procedure.

The point in dispute was the right of way claimed by Sarodapershad Mookerjee over some land in the possession of the defendant Toyluckonauth Sircar.

The case was heard and disposed of by the Joint Magistrate, who decided that, as the complainant had already a means of ingress and egress by another road, he had no right to make use of that one which passed through the defendant's land.

Some little time after the defendant commenced building a wall on the disputed road (the former obstruction was a mat tatee only), and the plaintiff again petitioned this time to the Magistrate.

The defendant also appeared, pleading the Joint Magistrate's order; but the Magistrate decided that the case was not a *res adjudicata*, and quashed the Joint Magistrate's proceedings, on the ground that the real issue under Section 320 had not been tried. He then sent the case to a Deputy Magistrate with full powers, who, considering that no breach of the peace was likely to occur, refused to adjudicate, although he ordered the defendant to desist in his building till the right to do so was settled by the Civil Court.

We have no doubt that the Magistrate's action was without jurisdiction. The Joint Magistrate being vested with full powers was not, *quoad* cases instituted before and tried by him, the Magistrate's subordinate, and the latter officer had no power to quash his proceedings, or to hear them on appeal. The law on this subject has already been laid down in the Court's letter No. 504, dated 29th June 1864.

It would appear from the Joint Magistrate's order that that officer did mistake the proper issue, and decided against the plaintiff, on the ground that he had already another way of approach to his house, instead of enquiring, as he ought to have done, into the question whether or no the new road was open to the use of complainant, according to the procedure laid down in Section 320 of the Code of Criminal Procedure.

But, whether right or wrong, the Joint Magistrate's order was not appealable to the Magistrate, nor had the Magistrate any right to interfere with it; and, this being so, it follows that the ulterior proceedings of the

Deputy Magistrate were informal, and consequently null.

We remark, moreover, that the Deputy Magistrate appears to have misconstrued the law equally with, though in a different manner from, the Joint Magistrate.

There is nothing in Section 320 which makes it imperative that there should be an apprehended breach of the peace before the authorities can interfere to decide a right of way.

Section 404 of the Code of Criminal Procedure gives this Court the power to send for, and take up, any proceedings of a Magistrate either in a civil or other trials, and, if it find that there has been an error in point of law, to amend the error, and pass such order as may appear legal and proper.

In this case the Joint Magistrate ought to have decided whether the complainant was in the use and occupation of the new road, and for how long, and, if he held him to be in such possession, to have retained him in it, leaving the owner of the land to determine the question of right to the easement in the Civil Court.

The complainant has been unfairly prejudiced by the Joint Magistrate's proceedings, and we therefore annul all the orders that have been passed in this case, and remand it to the Court of first instance for enquiry, in accordance with the provisions of Section 320 of the Code of Criminal Procedure.

The 22nd April 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover,
Puisne Judges.

Commitment—Evidence to be recorded.

Queen versus Mr. R. Anderson.

Referred under Section 434 of Act XXV. of 1861, and Circular Order No. 18, dated 15th July 1863.

A Magistrate, making an enquiry with a view to commit, is bound to record specially the evidence on which the commitment is made.

The proceedings of the Assistant Magistrate in this case were clearly irregular. There was no absolute necessity doubtless for the party complained against to prosecute; but, in accordance with paragraph 6 of this Court's Criminal Circular No. 19, the Magistrate, making an enquiry with a view to commit, was bound to take the usual legal

steps, and record specially the evidence on which he thought the commitment justifiable. Vol. I.

The evidence in support of the prosecution should have been taken *de novo*, and it was illegal to make it depend on the failure of the original prosecution to support the charge of "illegal duress."

The Assistant Magistrate has committed the case on what is not legal evidence, and we therefore annul his order, and direct him to proceed "*de novo*."

The 24th April 1865.

Present:

The Hon'ble F. A. Glover, *Puisne Judge.*

House-breaking by night.

Queen versus Emdad Ally.

Committed by the Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of House-breaking by night with intent to commit Theft.

Effecting an entrance into a house at night by scaling a wall constitutes house-breaking by night under Section 445 of the Penal Code.

There is no ground of appeal in this case. The evidence shows that the prisoner was caught at night inside the prosecutor's house, and that he could only have effected an entrance by scaling a wall. This, if proved, would constitute house-breaking by night under Section 445 of the Penal Code.

The jury considered the evidence adduced for the prosecution sufficient, and this is a finding with which there is no interference allowed, no point of law being involved.

The appeal is rejected.

The 24th April 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover,
Puisne Judges.

Counterfeiting Stamp paper.

Queen versus Shuroop Chunder Doss.

Committed by the Assistant Commissioner and Magistrate, and tried by the Deputy Commissioner of Cachar, on a charge of counterfeiting Government stamp.

The passing off of a one-anna stamp as a one-rupee stamp is not counterfeiting a one-rupee stamp.

Mr. Justice Glover.—The prisoner in this case has been convicted under Section 260 of the Indian Penal Code of using, as genuine, a stamp paper, knowing it to be

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It appears from the record that one Malvi Meeah, wishing to purchase a small plot of land, applied to the prisoner to draw the conveyance. Prisoner did so, and also supplied the stamp paper (the would-be purchaser not having one), alleging, as the witnesses for the prosecution say, that it was of the required value—*viz.*, one rupee. Some time after, Malvi was informed that his vendor's property was advertised for sale, and that amongst it was the piece of land he had bought. He went into the station on hearing this, and objected to the sale, when he was told that his conveyance was worthless, being written on a stamp of inadequate value, on a one-anna instead of on a one-rupee paper.

Many witnesses have been examined on either side. Those for the prosecution declare that the prisoner said, and they understood, that the paper on which the conveyance was written was a one-rupee stamp. Those for the defence, that the stamp furnished was a one-anna one, and that the purchaser, Malvi, knew that it was insufficient, but intended to have the kubalah copied afterwards on to a paper of the requisite value. There is a direct conflict of evidence, and it would be difficult to say which is the most trustworthy.

But, setting this aside for the moment, it appears to me that the conviction is bad in

law. The prisoner is convicted under Section 260; but the stamp paper filed is a perfectly genuine one-anna stamp; it is not, moreover, a counterfeit of any other stamp. It is true that, on two of the Bengalee letters of the word "anna," *semi-opaque* blots of ink apparently have been dropped. But there has not been the slightest attempt made to alter the word "anna" into "*roopya*," or indeed to alter the former word at all; and the word "anna" in the Persian character is perfectly intact.

It cannot be said, supposing for the sake of argument that these blots were placed over the letters in question by the prisoner, that there has been any attempt to counterfeit a one-rupee stamp. If the evidence on the part of the prosecution be perfectly reliable, the most that the prisoner could be found guilty of would be cheating in selling to the prosecutor a genuine one-anna stamp, and saying that it was a one-rupee stamp. I think that the prisoner should be released.

Mr. Justice Jackson.—I concur with Mr. Justice Glover. The stamp used was not a counterfeit stamp at all.

The evidence rather proves that a one-anna stamp was used with the consent of all parties instead of a one-rupee stamp. The deed of sale is not denied by the parties who sold the land, and even they admit that it was drawn out on the one-anna stamp, because they were in a great hurry for the money, and a one-rupee stamp was not forthcoming. The prisoner will be acquitted.

RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 24th April 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover.

Judges.

Murder—Evidence—Reference to Government for pardon.

Queen versus Gobindo Bagdee.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Houghly, on a charge of Murder.

Discussion as to the sufficiency of the evidence in a case of murder, and the necessity of applying to Government for a pardon on behalf of the prisoner.

Mr. Justice Jackson.—I DIFFER from the Sessions Judge in the view which he takes of the evidence. I think that that evidence, if true, is quite sufficient to prove that the prisoner Gobindo Bagdee killed Poresb Bagdinee, and I do not doubt its truth, but consider that the Jury were right to convict upon it. The witness Petumber Bagdee proves that a quarrel took place between Poresb and the prisoner, who kept Poresb as his mistress; and the words which then passed evince that the feeling of jealousy was aroused in Gobind.

The witness Jackson proves that, very shortly after, he saw Poresb lying on the ground close to the spot where the former witness had left her with the prisoner, and that Poresb was then groaning. This witness at once told Poresb's mother, Taramonee, who went to the spot, and found Poresb lying dead, and found the prisoner holding the body, and the prisoner then begged Taramonee not to inform against him, and that he would support her for the rest of her life. Another witness, Itchamohi, accompanied Taramonee, and saw Poresb lying on the ground and the prisoner there, and heard what passed between the prisoner and Taramonee. The latter witness then went away to give information to the gomastah and the chowkeedar.

This evidence is sufficient to convict the prisoner with the death of Poresb, unless he can explain it away. He denies that he was present at the time and place alleged, and calls two witnesses to prove that he was at the time working with them in the fields.

Before the Magistrate these witnesses supported the prosecution, and deposed that, though Gobind had been working with them, he had left them, at the very time the other witnesses say he was with Poresb. Before the Sessions Judge the prisoner would not have them examined. I think, however, that the Sessions Judge should have examined them for the prosecution.

Taramonee's evidence distinctly proves that Poresb was dead when she saw Poresb, and that the prisoner admitted it; and her evidence is strongly corroborated by that of Itchamohi. The police have failed to discover the body, it is true; but the evidence is still further corroborated by the disappearance of Poresb. The Judge thinks it improbable that Taramonee should not have gone to the nearest village and aroused the neighbours, but to one a little farther off. Had the Judge examined Taramonee as to the reason of her doing this, it is quite possible that she might have explained it. If the prisoner came from that nearer village, that might have been a good reason. Then the Judge thinks it improbable that the witness Ramjee should have gone away, as he states, and not aroused the villagers, and that the witness Itchamohi should not have done the same; and that the prisoner should have attempted to bribe Taramonee only, and not Itchamohi. But in this country people will not interfere in *such* a case more than they think actually necessary. Ramjee did go at once and tell Taramonee, Poresb's nearest relation; and it is very reasonable that, having done so, neither he nor Itchamohi would act any further, but leave the matter in Taramonee's hands. There is some discrepancy between Taramonee's depositions to the Magistrate and the Sessions Judge in one point. Before the Magistrate she said that Gobind took her to his house before she went to look for the chowkeedar; and before the Sessions Judge she omits this. But no question was asked regarding it. Again, it is a curious fact that, not finding the chowkeedar and gomastah, she did not arouse the villagers that same day, but sat quiet until the next day. But people in this country are very apathetic in such matters; and, finding that the body of Poresb had disappeared while she was gone

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Vol. III. to call the police, it is quite possible that Taramonee may have hesitated what to do next. But this does not make me disbelieve her evidence.

I see no sufficient grounds for any reference to the Government. Indeed, I would have convicted the prisoner myself on the evidence in the case.

Mr. Justice Glover.—I do not go quite so far as my learned colleague, but I agree with him that this is not such a case as we are bound to refer to Government under Section 54 of the Code of Criminal Procedure.

Supposing the evidence true, there was sufficient proof of the death of the woman Poresli. The witness Taramonee swore that she was dead. Itchamohi, in the Deputy Magistrate's Court, did the same; and although she did not depose positively to the fact before the Sessions Judge, she stated that Poresli was lying motionless, with eyes shut, and mouth open. No questions seem to have been asked her on this point; but, taking her deposition in connection with the positive evidence of Taramonee, and with the statement of the witness Ramjee, who first discovered Poresli lying in the sugarcane field groaning, I think there arises a strong presumption that Poresli is dead, and that the jury were not wrong in acting upon that presumption.

The connection of the prisoner with the crime was supported by the evidence of the two women; and, if the jury believed that evidence, they were, I consider, right in convicting. It cannot be said that, either in this point or on the one alluded to, they found their verdict contrary to the evidence.

There remains the question whether that evidence was so manifestly weak and insufficient as to justify this Court in applying to Government for a pardon to the prisoner convicted on it. I agree with Mr. Justice Jackson that there is no such insufficiency. The evidence is not *per se* incredible or even improbable; and, although, had I been the Judge trying the case, I might have given the prisoner the benefit of a doubt, I cannot say that I am in any way assured of his innocence, or that the jury were not justified in believing the evidence against him.

The 17th February 1865.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, Chief Justice, F. B. Kemp, and F. A. Glover, Judges.

Theft (Definition of).

Queen *versus* Madaree Chowkeedar.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of "Theft."

Ruling as to what constitutes theft as defined in the Penal Code.

Mr. Justice Glover.—That the chowkeedar Madaree, who is the landlord of the woman Dhojoo, took from her three cows, and gave them to her creditors, is clearly proved. It is not so clear whether the creditors retained the animals. They assert that they refused to take the cows, and that Madaree has them still in his possession. Anyhow, there is independent and reliable evidence to prove that Madaree took them from Dhojoo against her will.

The question is, is such a taking "Theft"? Theft is defined (Sec. 378 of the Penal Code) to be "a dishonest taking of any moveable property out of the possession of any person, without that person's consent."

"Dishonest" is, by Section 24, the doing anything with the intention of causing "wrongful" loss to a person, and by Section 23 "wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

Now, all these conditions seem to be fulfilled in the present case. There can be no doubt that the woman Dhojoo suffered "wrongful loss" of the three cows, and as little that Madaree, in taking them from her for the benefit of her creditors, caused and intended to cause that wrongful loss, and, therefore, in the words of the Code, acted "dishonestly."

The Sessions Judge considers that an illegal taking is not theft, unless it be done "*animo furandi*" and "*lucri causa*;" but this is not absolutely necessary, as appears from a case cited in Roscoe's "Criminal Evidence," p. 585, where a prisoner, who took a horse out of a stable, and afterwards backed him down a coal-pit, was convicted of "larceny," a conviction upheld by a majority of the Judges.

In the present case, the intention of Madaree to deprive Dhojoo of her property is established; and it makes no difference in the

former's guilt that the act was not intended to procure any personal benefit to himself.

The illustration put forward by the Sessions Judge to support his theory is not a happy one. No doubt, such a taking would not be theft, inasmuch as the rupee never reached the owner, *i. e.*, the durzee, and could not, therefore, be stolen from him. If the gentleman had paid the tailor his full wages, and if he afterwards forcibly took a rupee back, to which he himself made no claim, and gave it to one of the durzee's creditors, such taking would, in the words of the Penal Code, be a "dishonest" taking, causing "wrongful" loss to the durzee, and therefore theft.

I quite admit the distinction between this and an ordinary case of theft; but, looking to the words of the Law, I have no alternative, and must declare Madaree to have been guilty of theft, and his conviction by the Joint Magistrate to have been a proper conviction.

As, however, the point is a novel one, I should like the case to be laid before the Court generally for an authoritative ruling.

Mr. Justice Kemp.—A difference of opinion as to what constitutes the offence of theft, as defined in the Indian Penal Code, has caused this reference.

The facts of the case are briefly as follows:—Dhojoo, a poor widow, lived in the same homestead (though in a separate hut) with her landlord, Madaree, chowkeedar. Dhojoo appears to have owed small sums of money to the villagers. They complained to the chowkeedar, who, instead of directing the creditors to enforce their claims in a legal manner, took the law into his own hands, and seized the cows and other chattels belonging to the poor woman forcibly, and against her consent, and divided her property amongst her creditors. She brought a charge of theft against the chowkeedar under Section 378 of the Penal Code, and the Joint Magistrate of Rajshahye, Mr. Wingfield, convicted the prisoner Madaree chowkeedar of theft, and sentenced him to two months' rigorous imprisonment, and to a fine of 25 rupees realizable by distraint; the fine, if recovered, to be awarded to the prosecutrix after one month. As the decision of the Joint Magistrate is a short one, I give it "*in extenso*:"—

"I convict the prisoner of the charge. "It is proved by the evidence of both sides "that three alleged creditors of prosecutrix "complained against her to the defendant as

"her zemindar, and that he summarily settled Vol. III.
"the dispute by seizing 3 cows, value 9 or 10
"rupees, and handed them over to the cre-
"ditors—that he also sold her house to
"satisfy certain claims of his own against
"her.

"This act was certainly done dishonestly,
"*i. e.*, so as to cause wrongful loss (*see* Penal
"Code, Sections 24 and 23), as it was loss
"caused by 'unlawful means' of property to
"which plaintiff was legally entitled to."

On appeal, the Sessions Judge of Rajshahye, Mr. C. S. Belli, reversed this decision, holding that the offence was not theft, as the chowkeedar acted openly, and not for his own profit and without any "*animus furandi*."

The question that has been submitted for our consideration is, whether the offence committed by the chowkeedar Madaree amounts to theft, as described in Section 378 of the Indian Penal Code, or not?

That Section runs thus—"Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft."

Now, it is clear that the intention is the gist of the offence. There must be an intention to take "dishonestly."

The law explains how I am to construe the term "dishonestly" (*see* Section 24 of the Code)—whoever does anything with the intention of causing wrongful loss to another person is said to do that thing dishonestly; "wrongful loss" is explained in Section 23 to be the loss by unlawful means of property to which the person losing it is legally entitled.

There is reliable evidence that the cows belonged to the woman; that they were in her possession; that the taking was against her consent; that it caused her wrongful loss; that the means used to deprive her of property to which she was legally entitled were unlawful; and therefore the taking was clearly "dishonest" in the meaning of that term as laid down in the Code. The learned Commentators, at page 328 of their edition of the Code, state—"It is the intention of the taker which must determine whether the taking or moving of a thing is theft. The intention to take dishonestly exists when the taker intends to cause 'wrongful gain to one person or wrongful loss to another person.'" It must, I think, be admitted that, in the present instance, the chowkeedar, if a man's acts are any guide to his intention, intended to cause

ol. III. wrongful loss to the prosecutrix. Finding, therefore, all the main elements, which make up the offence of theft as defined in Section 378 of the Indian Penal Code, to exist in this case, it is my duty to apply the law as I find it, and not to put my own construction upon it. In this view I hold that the offence committed by Madaree chowkeedar was "theft."

It may be said that the chowkeedar thought he was doing rough justice; but I have nothing to do with that; my duty is to read the law as it stands.

I concur with my learned colleague, and desire that the case may be laid before a Full Bench of this Court.

The Chief Justice.—I concur with the two learned Judges of this Court that the case is one of theft in point of law. Could it be said that a servant would not be guilty of theft if he were to deliver over his master's plate to a pressing tailor, and tell him to pay himself?

The Judge was quite wrong in his remarks upon the Magistrate's memorandum of the prosecutrix's deposition in which she is said to say: "Defendant came and abused me, and took 3 cows out of my 8."

The Judge says: "What the figure 8 means, it is quite impossible for me to guess," &c. The meaning is very clear that defendant took three cows out of the prosecutrix's eight cows.

She says in another part of her deposition, "I saved only five cows."

I think the proper course will be to reverse the Judge's reversal of the Joint Magistrate's decision under Section 404 of the Code of Criminal Procedure, and order the Judge to cause the prisoner to be re-taken and to re-hear the appeal, and afterwards to transmit the record of the proceedings to this Court. As the prisoner has not had an opportunity of urging the case before the Court, the Court may intimate that, if the decision of the Magistrate be upheld by the Judge, the question of law will be submitted to a Full Bench, and the prisoner may have an opportunity of being heard either by himself or his vakeel. If the learned Judges agree with me, this order may be passed as suggested.

Mr. Justice Kemp.—I concur.

Mr. Justice Glover.—I concur.

The 25th April 1865.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Re-trial in the absence of the accused, a mere nullity—Power of High Court to order re-apprehension of the accused—Duty of Sessions Judge to obey.

Queen versus Madaree Chowkeedar.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of Theft.

The Sessions Judge, on appeal, without trying the merits of the case, reversed the Magistrate's conviction in a case of theft upon a point of law, reading the Penal Code by the light of his knowledge of the English Law. The High Court reversed the Sessions Judge's reversal of the Magistrate's conviction upon the ground that his decision was wrong in point of law, and directed him to re-apprehend the accused, and re-hear the appeal on the merits. The Sessions Judge thought that the High Court had no power to order the re-apprehension of the accused, and, proceeding to re-hear the appeal in the absence of the accused, acquitted him. HELD that the re-trial in the absence of the accused was a nullity; that, if the accused had been convicted instead of being acquitted, the case would have had to be re-tried; but that, as the Sessions Judge had declared his opinion that the evidence did not make out a case of guilt, it would be merely vexatious to the accused to order the re-trial of the case in his presence; that the High Court not only had the power to order the re-apprehension of the accused, but was quite justified in making the order; and that the Sessions Judge was bound to obey the order, and was highly censurable for his disobedience, and for the course which he thought proper to adopt.

The Chief Justice.—The Sessions Judge has now acquitted the prisoner upon the facts. Nothing, therefore, remains to be done so far as the trial is concerned. The Sessions Judge was informed that, if the decision of the Magistrate should be upheld by him, the question of law would be submitted to a Full Bench, and the prisoner might have an opportunity of being heard either by himself or his vakeel. The Sessions Judge did not uphold the decision of the Magistrate, but acquitted the prisoner, and reversed the conviction; yet the prisoner was uselessly instructed to appear personally or by the pleader in the High Court, for want of proper attention on the part of the Sessions Judge to the orders of the Court. The accused has been informed that his attendance is not required.

The Sessions Judge appears to me to have set up his own opinion against that of the Chief Justice and two other Judges of the High Court, and in consequence to have ne-

glected to carry out the orders of the Court. The prisoner had not been acquitted. He was convicted by the Magistrate of theft, and sentenced. The Sessions Judge, on appeal, without trying the case on the facts, reversed the decision upon a point of law, overthrowing the Penal Code, and holding, according to his own explanation in his letter of the 3rd February 1865, that, although the conduct of the chowkeedar might be said to have been dishonest according to Section 24 of the Code, it was not theft, because the act was not done *animo furandi* or *lucris causa*, reading the Penal Code by the light of his knowledge of the English Law.

The High Court reversed the Sessions Judge's reversal of the Magistrate's conviction, upon the ground that his decision was wrong in point of law, and directed him to rehear the appeal, and form his own judgment upon the facts disclosed by the evidence.

It was unnecessary, of course, that the accused should have notice of the re-trial of the appeal; and the Sessions Judge, having discharged the accused when he reversed the Magistrate's conviction, was ordered to re-take him, and to re-hear the appeal. The accused might have escaped, if notice had been given to him. The Sessions Judge, however, thought that the High Court had no power to order the re-apprehension of the accused, and, acting upon his own opinion in preference to that of the High Court, proceeded, as I understand, to re-hear the appeal in the absence of the accused. I say nothing as to the Sessions Judge's decision upon the facts, for that was a matter upon which he was justified in acting upon his own view of the evidence. But he was highly censurable for disobeying the orders of the Court in not causing the accused to be re-taken as he was directed, and not having him present in Court during the re-trial.

If he had convicted the accused in his absence instead of acquitting him, the case would have had to be re-tried. As it is, the re-trial was a nullity. But, as the Sessions Judge has declared his opinion that the evidence does not make out a case of guilt, it would be merely vexatious to the accused to insist upon the Sessions Judge's obeying the order of the Court, and re-trying the case in the presence of the accused.

It is unnecessary to argue the case with the Sessions Judge. All that I think it necessary to say is, that I am of opinion that the Court had the power to make the order,

that they were right in making it, and that the Sessions Judge was bound to obey it, and is highly censurable for his disobedience, and for the course which he thought proper to adopt. Vol. III.

I think the Sessions Judge should be asked whether, having reference to the opinion expressed in paras. 3 and 4 of his letter of the 3rd February 1865, and his subsequent examination of the evidence, &c., the appellant is, in his opinion, fit to be retained in an office which gives him so many opportunities of oppression and violation of law.

Mr. Justice Glover.—I entirely concur with the learned Chief Justice in thinking that the High Court had the power to make the order in question, and that that order was a proper one.

The accused was not, at the first hearing of the appeal by the Sessions Judge, acquitted, in any sense of the term, of the theft. He was absolved from punishment, because in the Sessions Judge's opinion the facts stated in the evidence against him did not sustain a charge of theft. Into the sufficiency or otherwise of that evidence to prove any offence, the Sessions Judge did not enter; and, therefore, I repeat, that his first proceeding was not an acquittal of the prisoner on a charge of theft, but a cancellation of the Magistrate's order on the ground that, whatever other offence the chowkeedar might have been guilty of, it was not "theft;" and, as this Court held the Sessions Judge to be wrong in law, and his definition of theft to be not a proper definition, it follows that the second hearing, which the Sessions Judge now asserts to be a fresh trial for an offence in which the prisoner had been once acquitted, was, in reality, the only trial in appeal the accused ever had on the charge of theft.

As the Sessions Judge has acquitted the accused on the evidence, we can do nothing more. It would be useless for me to point out in what I consider that the Sessions Judge has erred in detailing that evidence. The accused has now, at all events, been acquitted, and cannot be tried again, however strong the evidence against him.

For the rest, I think that the Sessions Judge should have deferred to the direction issued by this Court, and that his conduct in neglecting to do so is open to objection.

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The 1st May 1865.

*Present :*The Hon'ble G. Campbell and E. Jackson,
*Judges.**Assessors (Opinion of, to be recorded).**Queen versus Musst. Mina Nuggerbhatain
and Musst. Luchen.**Committed by the Magistrate, and tried by
the Sessions Judge of Behar, on a charge
of house-breaking, with intent to commit
theft.*

The grounds of each Assessor's opinion should be distinctly recorded by the Judge.

Mr. Justice Campbell.—This is a case which it is very difficult to deal with. According to the judgment of the Sessions Judge, there would not seem to be two sides of the case. He makes it perfectly clear and simple. Yet, at the end, we find that both Assessors were for acquittal on the first charge, and one of them for acquittal on the other charge also. Not the least clue is given to us of the grounds on which the Assessors came to this conclusion. The prisoners seem to have been poor beggar women, and the Assessors could hardly have had any prejudice in their favor. It seems to me that it is too much the custom to neglect the opinion of the Assessors, and put them in such a shape that this Court can make nothing of them. There is all the difference between the verdict of a Jury and the opinion of the Assessors. The former is a simple and conclusive verdict of guilty or not guilty. The other is not a verdict, but an *opinion*, and, not having any legal validity, its weight seems to depend solely on the reason and sense by which it is supported. It appears, therefore, to me that, in recording in writing the opinion of each Assessor as required by Section 324 of the Code of Criminal Procedure, the Sessions Judge should not merely put in his judgment that he concurs with or differs from the Assessors, but should separately record an opinion of each Assessor, and should invite and encourage each Assessor to make that opinion more than a bare expression for or against the prisoner, but an opinion on the case, stating the view that the Assessor takes of the facts and the considerations (in brief) on which his opinion is founded. In this case I do not think that the case can be disposed of with any regard to justice, without some more distinct record of the opinion of the Assessors; and I would remand the case to record more distinctly, in the manner suggested above, the opinion of each Assessor,

and then re-submit it. I understand that the omission to record any proper opinion of the Assessor is so common that this should (if the second Judge concurs) be laid before the Judge of the English Department for more general instructions.

Mr. Justice Jackson.—I quite agree with Mr. Justice Campbell's remarks on this case. The Sessions Judge should, when sitting with Assessors, and certainly when he finds their judgment differs from his own, call upon them to give the grounds upon which their judgment is arrived at. The law contemplates that Assessors should give their opinion on the case, while Juries are to be asked only for their verdict.

It appears to me, however, premature to call upon another Judge in this case to record his opinion on the prisoner's appeal. Mr. Justice Campbell, as I understand, has recorded no opinion as yet with respect to the prisoner's guilt or innocence, but wishes that an important omission, made by the Sessions Judge, should be rectified; and for that purpose the papers of the case should be returned to the Sessions Judge. I quite agree in the propriety of that order.

The 3rd May 1865.

*Present :*The Hon'ble G. Campbell, E. Jackson, and
F. A. Glover, *Judges.***False evidence—Compulsory statement to
Police.***Queen versus Nagena Ourut.**Committed by the Joint Magistrate, and tried
by the Sessions Judge of Rajshahye, on a
charge of false evidence.*

Discussion as to the propriety of a conviction on a charge of false evidence, one of the statements charged having been made to the police under compulsion.

Mr. Justice Campbell.—I entirely concur with the Assessors in thinking that the prisoner is entitled to an acquittal on the second charge. There is abundant evidence to the prisoner's innocence, but not a tittle of legal evidence to her guilt. There is, on the one hand, some evidence to prove that her deposition before the Magistrate was true; and, on the other, evidence to prove that she gave it under compulsion; either of which would go to establish her innocence. In fact, it is beyond doubt that on that occasion she either spoke truly or spoke from compulsion. To suppose that under the circumstances she voluntarily gave false evidence against

her son, is contrary to reason and human nature. The only evidence against her on this charge is the subsequent deposition before the Judge; and it appears to me that (as held on previous occasions) that deposition is by law inadmissible under the terms of Act II. of 1855, Section 32, as evidence against the witness in a criminal proceeding. Upon these two grounds—

First.—That the prosecutor has offered no legal evidence whatsoever on that charge.

Second.—That the prisoner is innocent of that offence—

I think that she should be acquitted and absolved on this second charge. In fact, the Judge seems to have no doubt whatever of her innocence, and seems merely to resort to the alternative finding as a device to get over his doubts on the first charge.

I think that the case should be remanded in order that the Judge, striking out the *2nd* charge, may record a clear finding on the *1st* charge, and submit the record to this Court for final disposal.

P. S.—I should mention another important consideration. Supposing evidence to have been offered on either charge and an alternative finding legally arrived at, it is quite clear that, in the spirit of Section 72, as well as in equity, the prisoner should be punished as for the less heinous of the two alternative offences of one or either of which she is found guilty. In this case it rather seems that the Judge in his alternative finding has punished with the most extreme severity of the law as for the major offence. Taking the alternative most favorable to the prisoner that she was induced to give false evidence before the Magistrate, but retracted and told the truth to the Judge, would 7 years' rigorous imprisonment be a reasonable punishment? I think not; I would have reduced it to 3 months or 6 months at most. It is in every way clear to me that, in the form of an alternative finding, the prisoner is really punished as for giving false evidence before the Judge without being convicted by the Judge of that offence, and that she should be fairly convicted or acquitted on that charge.

Mr. Justice Jackson.—I do not think that anything will be gained by a remand of this case. The Sessions Judge admits that there is no evidence to prove how the murder of Modhoo did take place. Before the Magistrate the prisoner at first deposed that she knew nothing about the manner in which Modhoo came by her death; that Modhoo went out at night, and did not return, and her

dead body was afterwards found in a tank. Vol. III.

The Magistrate then asked her what she said before the Police, and her reply was that she had said that her son had told Modhoo not to smoke, because there were other persons present; and her son then took her by the chin, and Modhoo fell down and expired, and that her dead body was then thrown into the tank. The Magistrate then asked her which story was true, and she replied that the latter was true, and that the first was told to save her son from punishment.

Before the Sessions Judge the prisoner again repeated the first statement which she had made before the Magistrate, and alleged that her statement as made before the Police had been elicited by bad treatment.

The Sessions Judge disbelieves the evidence to bad treatment. But I must say that, whether she was ill-treated or not, the story that she saw her son take Modhoo by the chin, and that Modhoo thereupon fell down and expired, is an evident falsehood, and there is every probability that such a story was made up by the Police, or made up by the prisoner through fear of the Police. The Magistrate does not examine the prisoner, or ask for any further details of what occurred, but is satisfied with her mere statement that the above impossible story is a true story.

My impression is, that the deposition which the prisoner really gave to the Magistrate in the *first* instance, and to the Sessions Judge afterwards, is the truth. At least it is, in the absence of all evidence, more like truth than the story of Modhoo being taken by the chin, and then and there expiring; and I think the prisoner is to be much commended instead of being punished for not continuing to repeat so false a statement. I would acquit the prisoner.

Mr. Justice Glover.—I concur with Mr. Justice Jackson that this prisoner should be at once acquitted, though not exactly for the same reasons.

I would not go to the length of saying which story was true, and which false; but I consider it proved (by evidence that is to all appearance circumstantial and true, and which, at all events, has in no way been rebutted) that the prisoner was coerced by the Police; that she received at least one kick, and was threatened with worse treatment; and that whatever she may have stated to the Joint Magistrate must be considered altogether null, and as if it had not been said, the statement being made after bad treat-

Vol. III. ment, and under the influence of threats. I observe that the Inspector, who is stated by the witness to have ill-treated the prisoner, was in Court for at least part of the time when her statement was being recorded by the Joint Magistrate; this was improper. If, then, the prisoner's statement to the Joint Magistrate be set aside as inadmissible, on the ground of its having been made under improper influence, there is no charge left, and no evidence to prove that her second statement to the Sessions Judge was not perfectly true.

The conviction depends on the two contradictory statements; and, if one of these be expunged from the record, no proof against the prisoner remains.

I would, therefore, acquit her; but I think it right to remark that, had the conviction been sustainable, the very severe punishment inflicted, no less than 7 years' rigorous imprisonment, was altogether uncalled for.

The 4th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover,
Judges.

Approver's Evidence—Corroboration.

Queen *versus* Issen Mundle and others.

Committed by the Officiating Magistrate of Furrceepore, and tried by the Sessions Judge of Dacca, on a charge of dacoity, &c.

An approver's uncorroborated evidence is not sufficient as proof against other persons.

Mr. Justice Glover. The circumstances of this case have been fully detailed by the Sessions Judge.

The conviction depends mainly on the evidence of Bungsee, an accomplice in the dacoity, who has been allowed to turn Queen's evidence.

With regard to the prisoners, against whom this man's evidence is the sole legal proof, I do not think it safe to convict. The

temptation to an approver witness to make out a good story, and earn his pardon, is very apt to produce evidence against many who had no concern in the crime to which he testifies; and, unless such evidence were corroborated in some way, I should decline to convict upon it. Very strong corroborative proof need not be required; but some is, in my judgment, absolutely necessary.

Taking this view, I would acquit the prisoners Barra Kodai, Nuddear, Kaleechurn, and Dmonath, there being no legal evidence against them beyond the statement of the approver Bungsee.

I would not interfere with the other sentences. Against the prisoner Huree Shobea is the evidence of the prosecutor's witness Anund Chunder, who swears to him as one of the men who plundered the boat, corroborated by the evidence of the approver, and by the wounded state of Huree himself.

In the case of Huree Madhub, Bungsee's evidence is supplemented by the prisoner's own confession before the Magistrate.

In that of Madhoo, the finding of certain articles of the stolen property (identified by the prosecution witnesses) in his house corroborates the approver Bungsee's statement, and is sufficient to convict this prisoner.

In the case of Issen, the approver's evidence is corroborated by the finding of part of the stolen property in his possession; whilst in that of Fukeer Chand, the whole circumstances are so strongly against him, that they, with the evidence above mentioned, render his conviction justifiable, although he did not confess to the Magistrate, as the Sessions Judge appears to suppose.

With reference to the prisoners whom I propose to acquit, the case must go before a second Judge.

Mr. Justice Jackson. I concur with Mr. Justice Glover that the recorded evidence is not sufficient to prove the guilt of the prisoners Barra Kodai, Nuddear Chand, Kaleechurn, and Dmonath. The Judge seems to have considered the evidence of the approver witness, corroborated as it was by the finding of certain property hid in a dry river, sufficient evidence. But this, though good corroboration of the approver being one of the dacoits, is no corroboration as against the prisoners; and uncorroborated approver's evidence cannot be admitted as proof against other persons.

The 5th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover.
Judges.

Insanity—Murder.

Queen *versus* Musst. Poochee.

Committed by the Deputy Commissioner of Kamroop, and tried by the Judicial Commissioner of Assam, on a charge of murder.

Discussion as to insanity in the case of a person charged with murder.

Mr. Justice Glover.—The report called for in this Court's resolution of the 26th January last has now been submitted, and by it at least one point has been thoroughly cleared up: that the woman Poochee is not pregnant, and that her statement to the Medical Officer, in the first instance, was consequently false.

As to her being 'insane,' the evidence of the Civil Surgeon appears to me altogether inconsistent and unsatisfactory. He admits that Poochee is competent to manage the affairs of every-day life, and to be capable of understanding the difference between right and wrong in matters of comparatively trivial importance, although he thinks her incapable of properly understanding that "murder" is a heinous crime. It is not for the Court to argue the question, but Dr. Clark's views appear to be opposed to those of Medical Officers who have made the subject of insanity their peculiar study.

Under the circumstances, however, and bearing in mind the long time that has elapsed since the woman was sentenced I would commute the capital sentence to one of transportation for life.

Mr. Justice Jackson. I concur with Mr. Justice Glover that, under all the circumstances of the case, the prisoner Poochee should be sentenced to transportation for life.

The 9th May 1865.

Present:

The Hon'ble F. A. Glover, *Judge.*

Abduction.

Queen *versus* Modhoo Paul.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of abduction, &c.

The abduction of a minor girl, under 16 years of age, out of the custody of her lawful guardian, is punishable under Section 361 of the Penal Code. It is not necessary to such a conviction that the abduction was forcible.

This appears to be a very clear case. It is well proved that the prisoner carried off the child Aladee, aged about five years, from the house of her father, whilst that father was absent, and when the mother, Musst. Radhamonee, was the child's lawful guardian. It is proved also, although that is not necessary to this conviction, that the carrying off was forcible. **Vol. III.**

The prisoner does not deny having possession of the child, or of marrying her almost immediately afterwards to a third party, but urges that all that he did was with the consent of the child's father (his own brother) to whom he paid the greater portion of the marriage dowry.

This is simple assertion, and even the prisoner's witnesses deny the statement altogether.

There can be no doubt that the prisoner took a minor girl, under 16 years of age, out of the custody of her lawful guardian, and is, therefore, punishable under Section 361 of the Penal Code.

I reject the appeal.

The 9th May 1865.

Present.

The Hon'ble E. Jackson and F. A. Glover,
Judges.

Disputes regarding possession of land, &c.

Queen *versus* Sectanath Roy.

Before passing an order in a case of disputed possession of land, &c., the procedure enjoined by Section 116 of the Code of Criminal Procedure should be carried out.

There appears to have been a dispute between Tarasoondeoree Bremonee, and her son Sectanath Roy, regarding the possession of a Cutchery Baree. The Police, apprehending a breach of the peace, went to the spot, and the matter ended by several persons on both sides being charged with the offence of Unlawful Assembly. The Magistrate acquitted them, but he at the same time directed that one of the two disputing parties, who, he thought, was proved by the evidence to have been in previous possession, should be re-placed in possession of the Cutchery by the Police, and retained in possession.

Vol. III. This order is now complained of before us as illegal. The order in question could only have been passed under Section 319 of the Procedure Code, and, before passing such an order, the Procedure enjoined by that Section should be carried out. But it is evident that no proceeding has been recorded: no notice has been served on the parties, and therefore the order passed is illegal.

It is set aside, and the Magistrate is directed to proceed according to law.

The 6th May 1865.

Present:

The Hon'ble F. A. Glover, *Judge*.

Dacoity—Presumption of participation in.

Queen versus Cassy Mul and Sree Churn Mul.

Committed by the Deputy Magistrate of Bancoorah, and tried by the Sessions Judge of West Burdwan, on a charge of dacoity, &c.

When persons are found, within six hours of the commission of a dacoity, with portions of the plundered property in their possession, the presumption of law is, that they are participators in the dacoity, and not merely receivers.

THE prisoners in this case were arrested by a chowkeedar very early in the morning as he was going his rounds on suspicion. He desired them to go with him to the thannah, and finally, with the assistance of the two other ghatwals, compelled them to go there, refusing money and ornaments as bribes to let them go.

On their arrival at the thannah, various ornaments and other things were found on their persons, which the prosecutor afterwards came forward and identified as part of the property stolen from him by a band of dacoits the night before their arrest.

The finding of these ornaments, &c., on the prisoners, and their identification as the property of the prosecutor, are points very clearly and satisfactorily proved by the evidence of several witnesses. The defence is altogether unsubstantiated, and out of a dozen witnesses not one is able to say a word in favor of either prisoner.

I dismiss the appeal therefore; but the conviction ought to have been as desired by the Assessors in the first Court. When persons are found within six hours of the commission of a dacoity with portions of the plundered

property in their possession, the presumption of law is, that they were participators in the dacoity, and not merely receivers.

The 11th May 1865.

Present:

The Hon'ble F. A. Glover,
Judge.

Illegal gratification (to influence the doing of official acts).

Queen versus Kaleechurn Serishtadar.

Committed by the Magistrate, and tried by the Sessions Judge of Sarun, on a charge of taking bribes.

The taking of a gratification by a Serishtadar to influence a Principal Sudder Ameen in his decisions, is sufficient to a legal conviction, whether the Serishtadar did or did not influence or try to influence the Principal Sudder Ameen.

THE appellant has been convicted by the Magistrate and Sessions Judge of taking bribes under Section 161 of the Penal Code; and this Court is now prayed to exercise the power given to it by Section 404 of the Code of Criminal Procedure, and to call for the record.

With the strength or weakness of the evidence on which the prisoner has been convicted by the Lower Courts, I have nothing to do; the only question is, whether there has been, in their proceedings, any error of law which calls for this Court's interference.

Mr. Allen, for the appellant, contends that his client has been convicted under Section 161 of "doing an official act," whereas it has been amply proved, by the sworn deposition of the Principal Sudder Ameen himself, that the prisoner never influenced, or attempted to influence, him in any way regarding his official acts. But on this I observe, in the first place, that the prisoner has been convicted of receiving illegal remuneration for doing "official acts," which had no connection whatever with his immediate superior, the Principal Sudder Ameen, such as receiving small sums for the filing of vakalutnamahs, petitions, &c.

But, had the conviction been solely for receiving illegal gratifications for influencing the Principal Sudder Ameen's decisions, it would have held good, whether the actual influence were exercised or not. The latter part of the explanation of Section 161 expressly mentions that "a person who receives a gratification as a motive for doing what he does not intend to do, or as a re-

"ward for what he has not done," is equally liable. And Illustration C explains that a person who induces another erroneously to believe that he has influence, &c., is punishable under the Section.

So that it would be immaterial whether the appellant in this case did or did not influence, or try to influence, the Principal Sudder Ameen. It would be sufficient to a legal conviction that he took a gratification for that avowed purpose, and the words of the Section, as explained by the Commentary and Illustration, include both doing and pretending to do.

It is objected, further, that there is no proof that the appellant either did influence, or intended to influence, the Principal Sudder Ameen as *Serishtadar*. But, granting this, it is quite clear that those who paid him did so, not in his individual capacity, but as one holding an office which gave him access to the Presiding Judge; and that they were induced to do so in the hope that his influence, as *Serishtadar*, would be exercised on their behalf.

It appears to me, therefore, that, on the appellant's pleader's own showing, there is no legal ground for appeal in this case, and that there is no necessity for sending for the record.

The 11th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover.
Judges.

Murder.

Queen versus Peter Ram Thappa.

Committed by the Assistant Commissioner of Cherrapoonjee, and tried by the Sessions Judge of Sylhet, on a charge of murder.

Case of conviction of murder on the confession of the accused, together with evidence as to his conduct both before and after the murder.

Mr. Justice Glover.—The Court's final order in this case has now been delayed for nearly five months, in consequence of the absence of the two European witnesses, whose evidence this Court wished to have recorded.

There appears from the Sessions Judge's statement to be no immediate prospect of these witnesses' return to Sylhet or Cherra-

poonjee; and, as the prisoner has been so long under sentence, I think the case should be disposed of at once on the evidence as it stands.

The circumstances have already been detailed. Against the prisoner are the proved facts, that he and the deceased (either his wife or his mistress, the witnesses speak of both terms indifferently) had, for some time past, lived on bad terms; that he had ill-treated her on various occasions; and that she had at last been obliged to flee for refuge to the house of witness No. 1; that he had been turned out of cantonments in consequence of his violent behaviour, and that he had openly threatened to kill both his wife and her temporary paramour. It is proved, moreover, that, on the night of the murder, there was a light in the prisoner's house; and that shortly before he had been seen hanging about the cantonment.

The deceased was found lying, with her throat cut, and quite dead, in front of her paramour's house. On that witness's return from fetching water, suspicion immediately attached to the prisoner, and a party of sipahees was sent to search for and apprehend him. They proceeded as far as Myrung, where, after some trouble, they found the prisoner concealed in a stable. On being brought before the European gentlemen, who chanced to be stopping at the Myrung dák bungalow at the time, he admitted at once freely and fully that he had murdered his wife out of revenge for her having deserted him.

This confession might not have been *per se* sufficient evidence against the prisoner, even if the gentleman before whom it was made had been present at the trial; but that it was made, and at the time, and under the circumstances stated, is admitted by the prisoner himself in his statement to the Assistant Magistrate. His excuse was, that he was drunk at the time, and did not know what he was saying; a plea completely disproved by the evidence of the sipahees who depose that the prisoner was perfectly sober at the time he made his confession.

Taking all the evidence together, I have no doubt of the prisoner's guilt, and would confirm the sentence of death passed on him by the Sessions Judge.

Mr. Justice Jackson.—The prisoner is charged with the murder of his wife. The parties lived in the Sylhet Cantonments. It is proved that his wife had been forced to leave his house by his ill-treatment of her,

Vol. III. and his threats of taking her life. She had in consequence gone to the house of another man, and was living with him. It is in evidence that he had been heard frequently to threaten to take the lives of both his wife and the man with whom she was living.

One night his wife was found with her throat cut. Suspicion falling on the prisoner, and he not being found at his usual haunts, Captain Ommanney, of the 44th N. I., sent a party of sepoy to search for the prisoner, on the road by which it might be expected that he would attempt to escape. These sepoys found the prisoner some miles from Sylhet trying to conceal himself in a stable. They seized him, and depose that they took him before Dr. Browne and Lieut. Nicholson who were at the bungalow close by, and before them the prisoner admitted that he had murdered his wife by cutting her throat. Before the Magistrate, the prisoner again admitted that he had told these gentlemen and the sepoys that he had murdered his wife; but he then said that he was drunk when he had made that statement. The sepoys, however, prove very clearly that he was not drunk, but sober. The case has been delayed to obtain the evidence of the two English gentlemen; but it appears that they had been ordered to the Bhootan Doars on public duty, and no steps have been taken by the Sessions Judge to enforce their attendance as soon as their public duties would admit of it. In my opinion, the evidence of the witnesses, who were examined at the trial, is quite sufficient to prove, without a shadow of a doubt, that the prisoner did murder.

There is no reason to distrust the depositions of the sepoys, the more so as the prisoner has himself admitted that they have correctly deposed to what he said. The prisoner was heard to have constantly threatened to take his wife's life. He was seen in Sylhet the day before the murder, and admits to the Magistrate that he was there. He was found shortly after the murder evidently attempting to escape, and there seems to be reason to believe that, in order to effect his escape, he set his house on fire.

I consider the offence of culpable homicide amounting to murder clearly proved against the prisoner; and, seeing no reason for mitigation of punishment, would confirm the capital sentence passed on him.

The 12th May 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover,
Judges.

Right of private defence of property against a thief, resulting in his death.

Queen versus Kurrim Bux.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Dinagepore, on a charge of culpable homicide not amounting to murder.

Case of exercise of right of private defence of property against a thief, who was seized in the act of committing a burglary in the house of the accused.

THE Sessions Judge has convicted the prisoner of culpable homicide not amounting to murder, and sentenced him to three years' simple imprisonment.

It appears that he seized a thief in the act of committing a burglary in his house, and that the thief was found, on the villagers assembling, to be dead. The prisoner says that he struck the thief one blow with a lathee; but the Sessions Judge and the Assessors disbelieved this, as the medical man, who examined the body (as the Sessions Judge reports), deposed that death resulted from strangulation. We find, on looking at this report and deposition, that the thief's death was caused by suffocation; and there seems to be no doubt, from the evidence, that the act of the prisoner in seizing and holding the thief, whose face was downwards, as he was getting into the house, caused the suffocation. We are not satisfied that, in exercising his right of private defence of property against the thief, the prisoner exceeded the provision of the law, and we, therefore, acquit the prisoner, and direct his release.

The 15th May 1865.

Present:

The Hon'ble G. Campbell, E. Jackson, and
F. A. Glover, *Judges.*

False charge of Dacoity (by woman).

Queen versus Nathoo Doss and others.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of instituting a false criminal proceeding on a false charge and giving false evidence.

Discussion as to the punishment sufficient for women charged with bringing a false charge of dacoity.

Mr. Justice Glover.—I HAVE gone through the evidence recorded in this case, and see no reason to interfere with the convictions. It is, I think, clearly proved that there was no dacoity, and that the prisoners made the false statements charged against them—the prisoner Nathoo, with a view to revenge himself on those of the villagers who were opposed to his continuance in the sirdarship, and had just succeeded in ousting him from it.

I think also that the sentence passed upon Nathoo is, under the circumstances, not too severe.

But I would reduce the punishment inflicted on the two women. One is the wife, the other the relative of Nathoo; and they were, doubtless, the former especially, very much under his influence, and could scarcely be called free agents.

I propose to sentence the wife to one year's rigorous imprisonment, and Ojabu, the relative, to eighteen months. The Judge, I observe, has given her the highest sentence allowed by law, *viz.*, three years.

With respect to these two women the case must be laid before another Judge.

Mr. Justice Jackson. I would not interfere with the sentences passed upon these two women. They took leading parts in the offence of which they have been committed, *viz.*, bringing a false charge of dacoity. The one went to the thanna, and gave the police the first information of the false dacoity, and the second received some of the property from the owners, and declared that the persons who had been falsely charged with dacoity placed those things in her house. The motive for their conduct is clearly proved. I would confirm the sentences passed, which do not, to my mind, appear heavy for the serious offence of which the prisoners have been guilty, and the part they took in it.

Mr. Justice Campbell. The offence is very heinous, and in some such cases women are as bad or worse than men. But as in this case the Sessions Judge who tried the case distinctly records his opinion that the women acted under the influence of the male head of the family, Nathoo, and considering the reason in the consideration shown by English Law for wives committing offences under the influence and in presence of their husbands, I think that, upon the whole, the sentences proposed by Mr. Justice Glover for the women are sufficient, and I would reduce them accordingly.

The 15th May 1865.

Present :

The Hon'ble F. A. Glover, *Judge.*

Uttering Forgery—Contemporaneous Sentences.

Queen versus Mohesh Chunder Sircar.

Committed by the Magistrate, and tried by the Sessions Judge of Jessore, on a charge of Forgery, &c.

The offence of uttering forged documents requires in this country to be punished with the severest punishment allowed by Law.

Contemporaneous sentences are not justified by the Penal Code.

THAT the prisoner presented the two forged mooktearnamahs, there can, of course, be no question. He admits that he did so, and admits that the documents were forged; the question is, whether he knew the fact at the time of so presenting them.

I agree with the Sessions Judge that the presumption is against him. He supplemented the forged mooktearnamahs by a wilfully false statement, that he was acquainted with the witnesses who came in to attest the execution of the mooktearnamahs, and so induced the presiding officer to credit the documents themselves.

He has failed to prove that these mooktearnamahs were sent to him by the parties who are said to have executed them, or in any way to rebut the presumption of fraud, which the presenting of such documents, under the circumstances of this case, gives rise to.

I consider the evidence sufficient for conviction, but on the *second* count only.

There is no evidence at all to prove that the prisoner actually executed the forgeries, whilst there is very strong presumptive proof that he uttered them, knowing them to be forgeries. I would not interfere with the sentence of seven years' transportation which the Sessions Judge has passed. The offence would be a very grave one anywhere, but in this country it requires to be repressed with the severest punishment allowed by law.

But the Sessions Judge should be told that contemporaneous sentences are nowhere justified by the Penal Code; and that, if he considered the prisoner's guilt proved on both counts, he should either have apportioned the punishment between the two, or have inflicted the full amount under the first head of the charge, leaving the *second* unpunished.

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The 15th May 1865.

*Present :*The Hon'ble G. Campbell, *Judge.***Trial by Jury—Foreigners.***Queen versus John Londley.*

Committed by the Magistrate, and tried by the Officiating Additional Sessions Judge of Hooghly, on a charge of voluntarily causing grievous hurt.

Requirements of the law with regard to the trial by Jury of a stranger and a foreigner.

THE main gist of the prisoner's petition of appeal is, that he, a stranger and a foreigner, was tried by a Jury ignorant of his language and his ways, and had not a fair trial: in fact, he claims the privileges given by the law to persons so situated, and to which, as I have before observed, he has a right.

But I find it quite impossible to ascertain from the record whether the provisions of the law were complied with. I can find nothing but a Bengalee list of the names of the Jury, which no one can read intelligibly.

The prisoner is—*1st*, entitled, under Section 323, to be tried by a Jury, of which at least one-half are Europeans or Armenians.

2ndly.—Under Section 349, the Jury must be summoned and drawn in such a way that, while at least one-half must be of those classes (that is, the number being uneven, the majority), he may not improbably have more than the necessary majority of his own class, if, after the full number of that class has been drawn, those following happen to be drawn of that class from among the panel of equal numbers of either class prescribed by this Section.

3rdly.—Under Section 343, he has a right of challenge of each Juror, and must be asked if he has any objection to each, and if, as he says, they were all landmen and persons unlikely to understand him, to the exclusion of all the Ship Captains and such like who could, it is possible that such an objection might have been allowed as likely to cause prejudice against him.

I must call on the Sessions Judge to certify whether all these requirements of the law were complied with, and how, if they were. He will also be so good as to certify in English the names of the special panel summoned for this trial under Section 349, the names of all the persons drawn by lot from the panel, the order in which they were drawn, the persons who were challenged, if any, and the decision passed on each challenge, and the name, roll, and profession

of each Juror by whom the prisoner was tried.

The 15th May 1865.

*Present :*The Hon'ble E. Jackson and F. A. Glover, *Judges.***Robbery.**

Queen versus Ruhman Khan, Hosseinee Khan, and Jehan Khan.

Committed by the Deputy Magistrate of Nowadha, and tried by the Sessions Judge of Behar, on a charge of cheating and robbery, &c.

Discussion as to what constitutes robbery.

Mr. Justice Jackson.—I THINK that the Judge is wrong in this case to convict the prisoners of robbery.

It is true that the witness to the theft deposes that when the witness followed the prisoners and began to cry out, one of them struck the witness with a stick, but this does not constitute the offence of robbery.

The prisoner, who struck the blow, did not, in the words of the law, in attempting to carry away property obtained by the theft, *for that end* strike the blow. I would alter the conviction from robbery to theft.

My impression, too, is, that the sentence is not commensurate with the nature of the offence committed. I would reduce it to two years' rigorous imprisonment against the prisoners Ruhman and Hosseinee, and confirm that of two years passed on Jehan Khan.

Mr. Justice Glover. I concur with Mr. Justice Jackson in altering this conviction and sentence, but I do so on the ground that there is no proof of the assault with the *lattee*. One witness, the woman Anloja, states that, on her following the prisoners, begging for the restoration of her property, one of them struck her with a *lattee*, but the other says nothing at all about it; on the contrary, her evidence tends clearly to show that, after the articles were snatched from the woman by the thieves, the latter went off at once, and that no further violence was attempted. Had there been any reliable proof of the blow, I should have considered the offence as robbery, as the violence would have been used to facilitate the carrying away of the property stolen.

But as the utmost proved against the prisoner is, that the property was snatched away from the owners, and as this did not cause "fear of present instant death and violence," the offence is reduced to **theft only**.

The 15th May 1865.

Present :

The Hon'ble F. A. Glover, *Judge*.

Abduction of minor girl with intent to marry, &c.

Queen versus Koordan Sing and Mohun Sing.

Committed by the Assistant Commissioner, and tried by the Deputy Commissioner of Cachar, on a charge of abduction with intent to marry, &c.

The abduction of a girl under 16 years of age with intent to marry, &c., without the consent of her lawful guardian, is punishable under Sections 363 and 366 of the Penal Code. The consent of the kidnapped person is immaterial, nor is it necessary to show that the taking or enticing away was by force or fraud.

THAT the prisoner Koordan Sing carried off a girl, Shabah Saima, she being a minor under 16 years of age, to the house of the other prisoner Mohun Sing, is not denied by either.

The defence of Koordan is, that the girl came to him willingly, and that he had permission to take her, as well as assistance in doing so, from Khela Sing's wife. Mohun Sing denies that he knew that the girl had been kidnapped.

Now, the lawful guardian of the girl for the time being was Khela Sing, in whose house Shabah Saima was, with the permission of her parents, residing. It was without his consent that she was taken away, and the consent of the kidnapped person would be immaterial. Nor would it be necessary to show that the taking or enticing was carried out by means of force or fraud.

It seems to me that, from the prisoner's own admissions, he has been rightly convicted; and whether the girl ultimately consented to cohabit with him, as he says, or whether she, though solicited to do so, refused, as she herself says, he still comes under the provisions of Sections 363 and 366 of the Penal Code.

The other prisoner is shown by the evidence to have known that Shabah Saima was brought to his house without the consent of her parents or guardians, and to have aided in keeping her concealed.

But, taking all the circumstances of the case into consideration, the fact of the girl's having, notwithstanding her assertions to the contrary, apparently willingly cohabited with the prisoner Koordan, and remained without objection in his house, I think that a less severe sentence than that passed by

the Deputy Commissioner will meet the requirements of justice. Vol. III.

I would commute the sentence of Koordan to two years, and that on Mohun Singh to nine months' rigorous imprisonment respectively.

The 15th May 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover, *Judges*.

Death—Women (carrying).

Queen versus Tepoo.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Rungpore, on a charge of wilful murder.

A woman, being quick with child, is exempt from capital punishment.

The prisoner confessed to the Joint Magistrate and to the Sessions Judge, and there cannot be the slightest doubt of her guilt.

The evidence shows that she had never been, nor was at the time, insane or irresponsible for her actions, and, under ordinary circumstances, we should have had no hesitation in confirming the sentence of death (to be carried out after delivery) passed on her by the Sessions Judge.

But the prisoner is quick with child, and such a state is always held to be a bar to eventual capital punishment. Following the usual precedents, therefore, we commute the sentence of death to that of transportation for life.

The 18th May 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover, *Judges*.

False Evidence (Punishment for)—Plea of guilty.

Queen versus Unnoo Patonoo and another.

Committed by the Assistant Commissioner, and tried by the Deputy Commissioner of Cachar, on a charge of false evidence.

What was held to be a sufficient punishment in a case of false evidence in which the prisoners pleaded guilty before the Sessions Court.

Mr. Justice Glover.—As both the prisoners pleaded guilty before the Sessions Court, the only question is about the sentence.

OL III. I think, under the circumstances, that five years' rigorous imprisonment is too severe a punishment. Not that I concur in the doctrine that a man pleading guilty to a charge of perjury before the Sessions Court is entitled to any diminution of his sentence; for that would, in my opinion, be holding out an inducement to unprincipled persons to take their chance of being found out when giving false evidence in a Court of first instance, on the assurance that, if they admitted their guilt at the Sessions, a "*locus pœnitentiæ*" would be afforded them, and they escape nearly scot-free.

But the record in this case does not disclose anything particularly bad against either prisoner, and I think that the ends of justice will be amply satisfied by a sentence of three years' rigorous imprisonment instead of five.

The papers must go before another Judge.

Mr. Justice Jackson. I concur in the mitigation of sentence proposed by my colleague. Three years' rigorous imprisonment will satisfy the ends of justice. The prisoners claim to be acquitted, because, although they at first denied their relationship, they afterwards admitted it. The facts are, that the prisoner Unnoo brought a charge of arson, and, to prove it, examined the other prisoner, a police constable, named Lukhiram. Being repeatedly asked whether they were related to each other, they at first denied any relationship, and then alleged only a distant cousinship, while it is proved, and in the Sessions Court admitted by them, that they are uncle and nephew.

I would note that, in case of giving false evidence, the record of the case in which the evidence was given should always be sent up, which has not been done in this instance.

The 19th May 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover,
Judges.

**Waging War with Power in alliance with
the Queen (Punishment for)**

Queen *versus* Keifa Singh.

*Committed by the Assistant Commissioner,
and tried by the Deputy Commissioner
of Cachar, on a charge of waging war
with an Asiatic Power in alliance with
the Queen.*

**Punishment for the offence of waging war with an
Asiatic Power in alliance with the Queen.**

Mr. Justice Jackson.—This prisoner has been convicted of waging war against the Manipore Rajah, an Asiatic Sovereign in alliance with the Queen, and under Section 125 of the Penal Code has been sentenced to ten years' transportation.

In the first place, as regards the sentence, I have to remark that it is illegal. The punishment for the offence in the Penal Code is transportation for life, or imprisonment of either description, which may extend to seven years. Transportation for ten years, consequently, cannot be inflicted. The sentence must be either transportation for the prisoner's whole life, or imprisonment not beyond seven years commutable to transportation for the same period.

In the second place, as respects the conviction, the prisoner complains that he cited numerous witnesses to prove that, at the time it is alleged that he accompanied the expedition into Manipore, he was absent on a pilgrimage at Dacca and Brindabun. The Magistrate refused to summon his witnesses unless the prisoner deposited rupees 50 for the expenses of each witness from Dacca, and rupees 200 for each witness from Brindabun.

The result was that none of the witnesses cited by the prisoner were examined. The prisoner complains that the Government had already attached the whole of his estate and sold it, and that he was, therefore, unable to defray the expenses of the witnesses. This attachment and sale took place under the provisions of Sections 183, 184 and 185 of the Procedure Code; the prisoner, not appearing within two years of the date of the attachment, is not now entitled to the proceeds of the sale. The only question is, whether his conviction and sentence can stand, when his witnesses have not been examined. The Magistrate was of opinion that these witnesses were cited by the prisoner for the purpose of vexation and delay, and hence he put in force the provisions of Section 228 of the Procedure Code. The Sessions Judge was of opinion that the Magistrate acted with good discretion; that the witness would not have said anything in favor of the prisoners unless they spoke with certainty, and this it was, he thought, next to impossible that they could have done; that the prisoner did go to Dacca or Brindabun undoubtedly. But the point was, whether he went before or after the expedition to Manipore; and the prisoner's acts in absconding and allowing his property to be set up

to sale, prove that he went after that expedition, otherwise he would have protested against the attachment and sale, or some of his managers would have protested on his behalf.

I think it would have been better had the Sessions Judge sent for and examined some few of the prisoner's witnesses, even though the Government had to pay their expenses. But the course taken by the Magistrate and the Sessions Judge was not against the law, though it is a course which should never be adopted except on extraordinary occasions.

If there was, in my mind, any doubt as to the prisoner's guilt, I would have put in force the provisions of Section 422 of the Penal Code, and directed some of the witnesses named by the prisoner to be examined. But the reasons given by the Sessions Judge are, in my opinion, on the fact of prisoner's absence on pilgrimage, quite conclusive; and it is quite certain that, even if the witnesses did depose to the prisoner's presence at Dacca at the time in question, they would not be believed. I commute the sentence to seven years' transportation.

Mr. Justice Glover. I concur with Mr. Justice Jackson in upholding this conviction.

The sentence of ten years' transportation, under Section 125 of the Penal Code, is illegal. But as, under Section 419 of the Code of Criminal Procedure, this Court has the power, on appeal, of altering or reversing any finding or sentence, so long as the punishment be not enhanced; and as, under the circumstances, I think that the lesser punishment awardable under Section 125 of the Penal Code is sufficient, considering that the prisoner has lost all his estates, I concur in sentencing him to seven years' rigorous imprisonment, commutable under Section 59 to transportation for a like period.

The 22nd May 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover,
Judges.

Enhancement of punishment under Section 75, Penal Code.

Queen versus Moluck Chand Khalifa.

Committed by the Officiating Magistrate, and tried by the Sessions Judge of Moorshe-dabad, on a charge of theft.

To justify enhanced punishment under Section 75 of the Penal Code on account of previous conviction, both convictions must be of offences punishable under Chapters XII. and XVII. of the Code, and committed after the Code came into operation.

Mr. Justice Glover.—With the conviction of the prisoner for theft this Court cannot interfere. The evidence was clearly and properly laid before the Jury, and on that evidence they convicted the prisoner.

But the punishment inflicted under Section 75 of the Penal Code, viz., five years' rigorous imprisonment, is illegal, inasmuch as that Section refers to previous offences coming under Chapter XII. and Chapter XVII. of the Act, whilst the offences of which the prisoner had been convicted were committed before the Penal Code came into operation.

To justify enhanced punishment under Section 75, both convictions must be of offences punishable under the Penal Code, and, therefore, committed after it came into force.

Under Section 379 of the Penal Code, therefore, the highest punishment to which the prisoner is liable would be three years' rigorous imprisonment, and to that punishment I propose to sentence him.

Mr. Justice Jackson. The Section under which the Sessions Judge has enhanced the punishment in consequence of previous conviction does not apply for the reason assigned by my colleague. I therefore concur in the modification of the sentence which he proposes.

The 23rd May 1865.

Present :

The Hon'ble F. A. Glover, *Judge.*

Using false evidence as true—Sections 196 and 471, Penal Code.

Queen versus Oodun Lall.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of corruptly using as true evidence known to be false.

A person who uses in Court false documents as true, besides swearing to their authenticity, may be convicted under Section 196 of the Penal Code only, and not under Section 471 also.

THE prisoner in this case was found guilty by the Jury, under Section 196 of the Penal Code, of using, as true and genuine, certain evidence, to wit, sundry laggits, which he knew to be false and fabricated.

The documents were filed by the prisoner, who was the putwaree of the proprietor in a suit under Act X. of 1859 brought against a ryot for arrears of rent.

He now appeals, urging no less than ten grounds for having the conviction reversed as contrary to law.

The 1st, 3rd, 4th, and 5th grounds require no notice; indeed, the prisoner's vakeel abandoned them as untenable. The 8th and

Vol. III. now refer to the laggit of 1267 which was not filed by the prisoner, and which, moreover, is admitted to be a true copy of the original and authentic document, and has formed no ground of the prisoner's conviction.

The second ground of appeal appears to me altogether untenable; doubtless, the evidence would have sufficed to have convicted on either count, for the prisoner used the false laggit as true, besides swearing to their authenticity; but there was nothing illegal in the Jury convicting on the one and acquitting on the other. Indeed, it would appear that the second finding of "not guilty" under Section 471 was a *pro forma* one, the real charge against the prisoner being comprehended in Section 196, under which the Jury had already found him guilty. There was no necessity for the second count at all; but, however this may be, the verdict of guilty under Section 196 was a legal verdict, and this Court has no power to interfere with it.

The 6th ground of appeal is a mis-statement of fact. The prisoner filed the laggit himself to prove that the ryot held a certain quantity of land of a certain rent. This was clearly evidence, and evidence which, if it had not been rebutted by the discovery of the forgery, would have sufficed to have turned the scale against the tenant.

The 7th is worthless. The object of the false laggit was to induce the Collector to decide the Act X. case in favor of the landlord, and that would have been in the words of the Regulation "to form an erroneous opinion on a point material to the result of the proceeding before him."

The 9th and last ground is equally bad. The prisoner swore that the laggit he filed were copies of the original; such a statement, of course, meant that he had compared the two together, and that the documents he filed were true copies.

I see no reason to interfere with the verdict, which appears to me to have been a perfectly legal one, and I dismiss the appeal accordingly.

The 23rd May 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover,
Judges.

Murder—Culpable Homicide.

Queen versus Akal Mahomed.

Committed by the Deputy Magistrate of
Rishoregunge, and tried by the Officiating
Sessions Judge of Mymensing, on a charge
of culpable homicide.

What is necessary to bring a case of murder under the 4th Exception to Section 300 of the Penal Code, so as to change the offence into culpable homicide not amounting to Murder.

Mr. Justice Jackson.—THE prisoner has been found guilty, on his own confession, of having assaulted his wife with a heavy stool, with which he struck her so violent a blow on the head that he fractured her skull in several places, and caused her immediate death. The Sessions Judge and the Assessors have found the prisoner guilty of culpable homicide not amounting to murder, and the Sessions Judge has sentenced the prisoner to ten years' transportation. The Sessions Judge, in giving his reasons for considering that the crime was not murder, says that the blow was probably given in the "sudden heat of passion, and without any intention of causing death," and that consequently the crime came under the 4th Exception to Section 300 of the Penal Code.

Here, as is so common with the Sessions Judge of Mymensing, Mr. Dodgson, he is clearly wrong in law. The 4th Exception lays down that "culpable homicide is not murder, if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner."

It is not sufficient for the Sessions Judge to find "that the blow was given in the heat of passion." To bring the case within the Exception he alludes to, he must find all the facts mentioned in that Exception.

In this case there does not seem to have been any fight at all, and certainly the offender took most undue advantage of his unfortunate wife, who was cooking his dinner, in assaulting her with the heavy stool, and acted in a most cruel and unusual manner.

The Sessions Judge's judgment in this case is, therefore, erroneous in law, and his conviction of culpable homicide must, I think, be set aside, and the case remanded for a new trial.

The Sessions Judge should, in putting his question to the Assessors, explain to them the law, as contained in the Penal Code, regarding the difference between culpable homicide and murder. Here the only question apparently is, whether the provocation received by the prisoner was such as to bring him within the first Exception to Section 300.

Mr. Justice Glover.—I concur with Mr. Justice Jackson in ordering a new trial, and I have so often recorded my reasons for thinking such a course proper under the circumstances of a case like the present, that there is no need for my recapitulating them here.

The 24th May 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover,
Judges.

Possession of land—Trespassers.

Queen versus Saadut Khan and Fuzul Ali.

Referred under Section 434, Act XXI. of 1861, and Circular Order No. 18, dated 25th July 1863.

A Magistrate is quite justified in preventing a person from entering upon land in the possession of another.

We do not see in what respects the Deputy Magistrate's orders are illegal.

He went, it appears, to the spot, and, after hearing evidence on both sides, found that the plaintiff had been in possession of the land for a considerable time, some 7 or 8 years. The Deputy Magistrate does not seem to us to have decided in any way the question of title; practically he conducted the inquiry under Section 318 of the Criminal Procedure Code, and held that the plaintiff was in possession, and had been so for a long time.

Having decided that the land was in the plaintiff's possession, and had been so for years, we do not see why he was debarred from punishing what was, under that state of circumstances, a manifest and admitted trespass. The defendants allowed that they had dug the trench and stood upon their rights to do so, alleging the land to be their own. It was for them to have proved their allegations in the Civil Court, and to have regained possession; but as they chose to enter upon land which, although it might have been justly their own, was proved to have been in the possession of others for several years, and to commit a certain amount of damage to it by digging a trench, we think the Magistrate's order was justified, and that the defendants were rightly prevented from entering upon land in the possession of another.

The 25th May 1865.

Present :

The Hon'ble G. Campbell and E. Jackson,
Judges.

Lurking House Trespass and Theft.

Queen versus Musst. Mina Nuggerbhatin and Luckea.

Committed by the Deputy Magistrate of Nawada, and tried by the Sessions Judge

of Behar, on a charge of House-breaking with intent to commit theft, &c. Vol. III.

Discussion as to whether cumulative punishment under Sections 454 and 380 (*s. e. Lurking House Trespass and Theft*) is legal.

Mr. Justice Jackson.—I see no reason to interfere in the conviction of the prisoners. I have no doubt they did break their way into the house, and commit the crime of lurking house trespass, with the intention to commit theft. But it has been ruled that, in such a case, although there has been theft, the conviction should be only under Section 454 of the Penal Code, and not under that Section and also Section 380. I think the sentence passed under Section 454 is sufficient, and that the sentence passed under Section 380 should, therefore, be remitted.

Mr. Justice Campbell.—In my opinion, a cumulative sentence under Sections 454 and 380 is legal; but in this instance, looking to the circumstances of the case, I think the term of imprisonment awarded under Section 454 sufficient, and, in that sense, I concur in remitting the additional term.

The 30th May 1865.

Present :

The Hon'ble F. A. Glover, *Judge.*

Evidence (of Briber)—Bribing Public Servant.

Queen versus Obhoy Churn Chuckerbutty and Nobin Chunder Chuckerbutty.

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of taking gratification under Section 161 of the Indian Penal Code.

The evidence of the person who bribes is admissible against the person bribed.

A person, who accepts, for himself or for some other person, a gratification for inducing, by corrupt or illegal means, a public servant to forbear to do a certain official act, is punishable, not under Section 161, but under Section 162 of the Penal Code.

THE circumstances of the case have been fully detailed in the remarks of the Sessions Judge, and there is no need for me to recapitulate them.

The prisoners, who have been ably defended by Counsel, urge—(1) that the evidence of the witness, Nobin Chunder Koondo, was inadmissible, he being the person said to have paid the bribe; (2) that the conviction, supposing the case proved against them, should have been under Section 163 of the Penal Code, and not under Section 161; and (3) that the evidence generally is discrepant and insufficient for conviction. The first objection is worth nothing. Construction No. 757

Cr. 23.

Vol. III. quoted by the prisoner's Counsel, recites that a Court cannot *compel* a person to give evidence on oath, touching a bribe alleged to have been administered by himself. But there is nothing in the law, *vide* Reports, W. P., 1855, Part II., page 81, to prevent him giving such evidence against the person bribed if he chose to do so.

The witness, Nobin Chunder, could have refused to answer any question that would have criminated himself, and, as he elected to tell the whole story, he has, of course, laid himself open to a criminal information; but his evidence was perfectly admissible, and the Sessions Judge was quite right to receive it.

The second objection depends on the Court's determination of the third. And, with regard to this, I see no reason to differ from the Sessions Judge. I have gone very carefully over all the evidence, and, although there are doubtless some small discrepancies observable, they are not of a nature to throw suspicion on the evidence generally, which is essentially consistent and satisfactory. The Assistant Magistrate, who got up the case for the Sessions, states the difficulty he had in inducing the parties to come forward, and it is quite clear that there was neither intention nor desire to expose the offenders, and that chance, which directed the Assistant Magistrate's attention to a "paragraph" in a local native newspaper, was the cause of the prosecution. It is contended for the prisoners that this "paragraph" was part of a cleverly contrived plot, and that it was inserted in the expectation of its leading to enquiry; but this is simple assertion, rebutted by the sworn testimony of the editor of the paper, who deposes that he inserted the paragraph himself, and on his own responsibility; being aware of the truth of the facts therein stated, and that the prosecutor neither asked him to insert it, nor knew of its insertion. I may mention here another objection urged by the appellant's vakeel against the Assistant Magistrate's competence to set this prosecution going; the objection is untenable, as the case was investigated by order of the Magistrate, and his Assistant was merely an officer carrying out the orders of his official superior.

For the rest, the evidence distinctly proves that both of the prisoners were present, and took part in the receipt of the money; and that the object of the bribe was the abandonment of a police case against one Mohima Chunder Koondoo, a nephew of the prosecutor, which case, had it been carried out, would

have enabled the police to search Nobin Chunder Koondoo's house, and to subject him to great indignity. The witnesses who depose to these facts are men of substance and respectability in the town of Commercolly, and their evidence is corroborated by the production of the gomastas and the prosecutor's account books, in which the item 300 rupees is entered on the day stated. These books are denounced by the prisoners' Counsel as false, and made up for the occasion; but neither the prisoners' vakeel in the Sessions Court, nor the assessors themselves, who acquitted the prisoners, could find anything to object to on their appearance; and even if it be admitted that the smaller book might, from its containing comparatively few pages, have been written for the purpose of bolstering up the present charge, the same remark cannot apply to the larger *khata bhai*, which belonged to Fetteh's *mahajane* establishment, and which contained hundreds of entries, both before and after the date of the present transaction, and against which nothing was alleged.

The evidence adduced for the defence is absolutely worthless, and I have no hesitation in agreeing with the Sessions Judge that both prisoners are guilty.

It remains to be seen to what extent, and this brings me to the appellant's second objection.

With regard to the Sub-Inspector, the conviction under Section 161 of the Penal Code was right. He was a public servant, and he took a gratification other than a legal remuneration for doing, in the exercise of his official functions, a favor to the party requiring it. If the evidence is to be believed, there can be no possible doubt of the man's guilt under Section 164.

But I do not see how this Section can be made to apply to the ex-Nazir, Obhoy Churn Chuckerbutty. His part in the affair was that of a private individual, that is to say, that the favor to be accorded in return for the gratification was not to be done by him in the exercise of his office functions, but by the Police Inspector.

The offence of which he has been convicted would seem to come under Section 162 of the Code. The prisoner accepted for himself or for some other person a gratification for inducing, by corrupt or illegal means, a public servant to forbear to do a certain official act. But as this offence is punishable with three years' imprisonment or either description, with or without fine equally

with one under Section 161, there is no reason for interfering with the Lower Court's order, further than to amend the Calendar, and substitute Section 162 for Section 161.

The 30th May 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover,
Judges.

Accused (Right of, to cross-examine Witnesses).

Queen *versus* Nobo Coomar Banerjee.

Referred under Section 434 of the Code of Criminal Procedure and Circular Order No. 18, dated 15th July 1863.

Conviction quashed, the accused not having been allowed an opportunity to examine certain witnesses.

This case has been sent up by the Sessions Judge under Section 434 of the Code of Criminal Procedure.

It appears that one Nobo Coomar Banerjee was convicted by the Magistrate of Howrah under Section 403 of the Penal Code, and sentenced to a fine of 50 rupees, or, in default, a month's rigorous imprisonment, for misappropriating a piece of silk said to be a part of a quantity lost in the Cyclone.

The Sessions Judge holds the conviction illegal: *first*, because there is no proof that the silk had ever been lost in the Cyclone; and, *secondly*, because the accused had not been allowed an opportunity of cross-examining the police witnesses.

The first objection appears to us untenable. The silk might or might not have been part of that lost in the Cyclone. The presumption arising from the different circumstances detailed by the Magistrate would seem to shew that it was. But in any case, supposing the accused's possession of it established, he would have been equally guilty under Explanation 2 of Section 403, if he had found the silk before the Cyclone or at any other time, if he did not use reasonable means to discover and give notice to the owners. It was not, it appears to us, necessary to a conviction to prove that the silk was actually lost during the Cyclone, although that might have been the allegation for the prosecution.

The second objection must, we consider, be allowed. The accused requested permission, and his request was granted by the Magistrate to re-summon, and to cross-examine the police witnesses; but the case was finally disposed of against him without

any further notice being taken of his application, and without his having been allowed the opportunity prayed for.

We therefore quash the conviction, and direct that the evidence be taken *de novo*, giving the accused the opportunity of cross-examining the witnesses referred to.

The 2nd June 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover,
Judges.

Assessors (Grounds of opinion by)—Admissions by Prisoners (to the Police).

Queen *versus* Bushmo Anent.

Committed by the Deputy Magistrate of Serajgunge, and tried by the Sessions Judge of Rajshahye, on a charge of murder.

Assessors ought to give the grounds of their opinion particularly when they differ in opinion from the Judge.

Admissions made by prisoners to police officers, while in their custody, are not admissible in evidence particularly when no witnesses are called to prove them.

BEFORE passing final orders in this case, we think that some further enquiry should be made.

We observe that, although there is a strong *prima facie* case made out against the accused, still the assessors, who sat with the Sessions Judge on the trial, recorded their opinion that the charge was not proved against her. The Sessions Judge differs from the assessors, and has given it as his opinion that the assessors are for an acquittal, not from an honest conviction of the accused's innocence, or from an honest doubt as to her guilt, but from a desire to have no hand in convicting a person of a crime for which the probable sentence will be death. We think that, before the Sessions Judge came to the conclusion that the assessors had no ground for their opinion, he should have asked them as to the grounds upon which they arrived at it. Under the law a Jury is required to deliver its verdict. But assessors are appointed to aid the Judge in the trial, and are to give their opinion, and, when that opinion differs from that formed by the Sessions Judge, the latter should always ascertain the grounds of the assessors' opinions. The decision does not rest with them, but they are to assist the Judge at the trial, and in no better mode can they assist him than by stating the reason for their opinion when the case is one on which there may be a difference

Vol. III. of opinion. We request that the Sessions Judge will re-call the assessors, and will ascertain from them and forward to this Court the reasons upon which they were of opinion that the accused ought to be found not guilty.

We think also that some further enquiry should be made in the case.

Before the Magistrate, Nursing Pal deposed that the accused had had some quarrel with his wife. The wife should be sent for and examined on the point. Horree Chung, the servant of Gobin Pal, should be further examined as to what he saw the child doing at one pahar of the day on which it was lost, and who was then with the child, and where the accused then was. Nursing Pal should be asked, who the man was whom he says he met when he saw the accused bathing, and who told him that the accused had not taken the child away, and that man should be examined. Then, again, when the accused returned from bathing, and before the dead body of the child was brought in, some persons must have questioned the accused as to what she had done with the child, and what were her replies then; and also, after the dead body was brought in, what did she say when she was accused. Nursing Pal deposes that there was a faqueer in the house assisting to revive the child. Is anything known regarding this faqueer, and how did he come there? The accused states that she obtained the gunny bags on which she was found sleeping from Nemai Chuneca; he, or his people, who gave the bags, should be examined as to what occurred when the bags were given. The accused denies that the ornaments were found upon her. This is the most important piece of evidence in the whole case, and yet there is a direct contradiction in the depositions before the Sessions Judge and the Magistrate; before the latter the witness says that the bag containing the ornaments fell from her person as she stood up in the jungle on being awake; and before the former they say that the accused, while going to the house of Romanath Sen, was pressing something to her side, and that this was, on reaching Romanath's house, found to be a bag containing these ornaments. This discrepancy should be cleared up. The most valuable ornaments appear to be still missing. The accused, after being cautioned, according to Section 373, that she has the option of refusing to answer, should be asked as to where these ornaments were found, if not upon her, and whether she did take the child to her house in the morning, and, if so,

then for what purpose she took the child, and what became of it, and when she last saw it.

The Sessions Judge has directly contravened the law in admitting, in evidence against the prisoner, admissions said to have been made by her to the police officers while in their custody. It is the more necessary that any such statement should be at once rejected as evidence, now that no witnesses are required to attend to prove such statements.

The Sessions Judge is requested further to examine the witnesses, to ascertain if the child could walk about easily, so that it might have strayed into the jungle where it was killed. Is it possible that any suspicion can attach to Dusrut Malee, who goes to the jungle to cut wood, and could he have placed the ornaments where they were found if they were found on the accused, when she was sleeping? Dusrut Malee's house might be searched to ascertain if the rest of the ornaments are with him. As it is very desirable that these enquiries should be held by the Officiating Sessions Judge before the return of Mr. Belli for whom he is acting, we direct that he will at once make such arrangements as will enable him to complete the necessary proceedings at Pubna before he vacates his present office.

The 2nd June 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover,
Judges.

Murder.

Queen versus Nilmadhub Sircar, Ameerooddeen, Fagoo Khan, and Hurree Raj Bungshee.

Committed by the Officiating Joint Magistrate of Moorshedabad, and tried by the Sessions Judge, on a charge of murder.

A is guilty of murder if he several times kicks B, who, after having been severely beaten, has fallen down senseless; as A must have known that such kicks were likely to cause death in B's state at that time.

We have carefully considered the proceedings held on the trial of the prisoners, and are of opinion that the evidence recorded does not bear out the offence of murder, except against the prisoner Hurree. He must have fully known, when he gave several severe kicks to the person who was in his charge, and who, having been severely beaten, had fallen down senseless on the road, that such kicks were likely to cause death in the

state in which the man then was. We therefore confirm the conviction of murder against him; but, under all the circumstances, sentence him to transportation for life. As against the other prisoners, we are of opinion that the evidence proves the offence of voluntarily causing grievous hurt for the purpose of extracting information and confession from the sufferer to lead to the detection of an offence, and, under Section 331 of the Penal Code, we sentence them to 10 years' transportation.

The 3rd June 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover,
Judge.

Attempt to murder—Security for good behaviour.

Queen *versus* Beharee *alias* Kurreem Bux.

Committed by the Officiating Magistrate of Patna, and tried by the Sessions Judge of Shahabad, on a charge of attempting to murder.

Prisoner acquitted of attempt to murder, but directed to be proceeded with by the Magistrate under Section 207, Code of Criminal Procedure, with a view to security being taken for his future peaceable behaviour.

Mr. Justice Jackson.—THE prisoner has been convicted of attempting to murder Mr. Ainslie, the Judge of Patna, and has been sentenced to ten years' rigorous imprisonment.

Mr. Ainslie's deposition is to the following effect:—"In the evening of Saturday, the 18th March last, I left Cutcherry about 4 to 6 on my way home, driving in my buggy. On leaving the Cutcherry compound, I saw a man, whom I recognize as the prisoner, standing on the north side of the road with his back towards me, about 8 or 10 yards in front of my house. I called out to warn him. He crossed over to the south side of the road, keeping his back towards me. I also edged off to the same side to avoid him; but the more I pulled to one side, the faster he came. I was obliged to pull up to avoid running over him, as I could not pass between him and a wall which skirts the road to the south. As soon as the horse stopped, he turned round, seized the horse or some part of the harness, with his left hand, and raised his right hand, in which he had a knife, over his head. I then urged my horse on; and, as it sprang forward, the prisoner struck

with the knife, and jumped on one side to avoid the wheels of the buggy. He then ran a few paces after the buggy, after which he stopped. The horse was uninjured, the blow having taken effect on the collar. The prisoner did not attempt to strike at me. He ran after the buggy, brandishing his knife, and muttering something, but I could not understand what he was saying. The prisoner appeared to be perfectly sensible, but in an excited state. I think the prisoner's intention, undoubtedly, was to attack me. Had the blow taken effect on the horse three inches from the back, the horse must have been brought to the ground, and I should have been thrown out of the buggy, and at the prisoner's mercy. The prisoner might have avoided the buggy; if he had stood still, he would have been quite free of the buggy."

The prisoner's defence at the Sessions was: "I was drunk with gunja. I tried to get out of the way of the buggy, and I accidentally struck the collar of the horse. I had the knife about me for protection against tigers." Then he says: "A faqueer threatened my life, and I always had the knife with me. I did not hear the sahib coming."

Mr. Howard, the Superintendent of Police, deposes that, on the prisoner being arrested shortly afterwards, he questioned the prisoner as to his act and the motive, when the prisoner said, *Hum adme ka marna wallah nahie, i. e.*, I am not the person to strike a man. Then he said he had been annoyed at something, and had struck with the knife.

Ramduin chuprassee and Guddeep Suhai depose that, on being told by Mr. Ainslie of the occurrence, they went after the prisoner, and found him brandishing his knife and saying, *Hum koi ko mara nahie*. I have struck no one; and that, on an attempt being made to seize him, he put the knife to his throat.

The Sessions Judge and the Assessors are of opinion that the prisoner committed the act of striking the horse with the ultimate object of striking Mr. Ainslie; and that the prisoner had a premeditated deliberate intention to murder Mr. Ainslie. The Sessions Judge comes to this conclusion from the narrow and unfrequented part of the road where the prisoner met Mr. Ainslie, his deliberately and systematically impeding the progress of the buggy, his suddenly turning round, seizing the horse by the harness, and brandishing the knife, the severe blow which he aimed at the horse, the knife

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Vol. III. itself being of an unusual shape, not such as is usually kept by natives for ordinary purposes, but a murderous weapon for the possession of which the prisoner could give no satisfactory accounts, and lastly the conduct of the prisoner since his arrest, his feigning insanity and general demeanour.

There is no doubt that Mr. Ainslie, the only person who witnessed the assault, is of opinion that the attack was intended beforehand, and was directed ultimately at himself. But we must judge of the prisoner's intentions by his act, and by all the surrounding circumstances of the case.

In the first place, there is nothing to prove that the prisoner knew who the driver of the buggy was, until after he had struck at the horse. He told the Superintendent of Police that he knew him to be the Hakim of the Adawlut, but he may have ascertained this after the buggy reached him, and he turned round, and saw the driver. Mr. Ainslie's deposition is that the prisoner had his back turned towards the buggy from the time he came in sight until he actually turned round and struck at the horse. On the other hand, it may be that the prisoner might have seen Mr. Ainslie in the buggy before he left the Cutcherry compound. There is no evidence to shew whether this was possible, *i. e.*, whether the view was open or impeded by any wall.

In the second place, there is great probability in the defence of the prisoner that he tried to get out of the way of the buggy, and, finding himself very nearly run over, struck at the horse as he jumped aside to escape the buggy wheel. The confused habit of people, when called to get out of the way of a buggy, at once to cross the road and get still more in the way, is very common. The prisoner, when called to, edged off to the same side of the road to which Mr. Ainslie did, until the distance between them of 8 or 10 yards only was passed, and the buggy was close upon the prisoner's heels. Mr. Ainslie deposes that he then pulled up, but he must have been close upon the prisoner; and the prisoner, having his back turned towards him, may have thought that the horse and buggy were going over him, and so turned round and seized hold of the horse by the harness. It is extraordinary that the prisoner should have had a knife so ready to his hand that, in the act of turning round, he brandished it in his right hand with his arm up in the air. But, if he had such a knife either in his hand or easily laid hold of, it is possible that he may have merely

brandished it with the intention of making the driver stop. It might be that this did not have the anticipated effect, and it did not, as Mr. Ainslie states that he then "urged his horse on," or "let his horse go," as he says before the Magistrate; and the prisoner then, finding the horse and buggy were going over him, struck at the horse, at the same time jumped aside to escape the wheels.

It may be very fairly urged for the prisoner that there is very little in all these facts to prove that the prisoner had any premeditated intention to attack Mr. Ainslie; and that the whole of the circumstances are very natural, and such as might occur to any stupid or confused person who was nearly run over by a buggy.

But the suspicious circumstance in this case is that the prisoner had the knife so ready in his hand, and the peculiarity of the knife itself. It is not a knife such as natives ordinarily use. The Sessions Judge describes it as 5 inches long in the blade, with a sharp point and double edged, and having an iron guard. The prisoner admits that it is not an ordinary knife. No account is given by him as to where he obtained it. It is curious that no question was put to him on this point, and it is not clear whether he had lately obtained it, or had it long by him. He states that he kept it for protection against tigers and against a faqueer who had threatened his life. No question was put as to what faqueer he alluded to. But it may be inferred that all this part of the statement is false. It is in no way supported by any evidence; and the wearing of a dagger like this, as a protection against tigers in the streets of Patna, is simply ridiculous. The prisoner admits apparently that he has for some years resided in Patna, hanging about other people's houses; but one great difficulty in the case arises from the fact that no one will admit having ever seen the prisoner, or had any intercourse with him, which can hardly be true; and the police have utterly failed to discover anything as to his antecedents. But, to return to the prisoner's answer, it may be said to be an admission that the prisoner knew that the knife he carried was not one to be used in ordinary purposes, but was one to be used to take life. Had it been an ordinary knife, I should have had no hesitation in acquitting the prisoner at once. But it is still doubtful whether, notwithstanding the suspicions arising from the possession of this knife, the prisoner did premeditate an attack on Mr. Ainslie.

As to his conduct after he had struck the blow, there is the fact that he ran after the buggy a few paces, brandishing the knife, and muttering in an excited state. Then it is proved that he ran away, and before he was laid hold of, as well as after it, he, knowing full well what he would be charged with, said he had struck no one, and had no intention to strike any man. It may be said that the thought which was uppermost in his mind showed what his real intention was. But, on the other hand, it would be the natural exclamation of a man who had not intended to do more than save himself. I think nothing of his running a few paces after the buggy.

The prisoner appears to be an outcast fakueer, living by begging, whose very mode of life shows that he is not altogether in his right senses, half Hindoo and half Mahomedan, as appears from his two names, Benatee alias Kureen, Bux, probably, as he states, a smoker of gunja. It is possible that this sort of man might be made use of by designing persons to attack Mr. Ainslie, and circumstances have lately occurred at Patna which might have led such persons to make use of him. But we cannot convict the prisoner on surmise. We must be quite satisfied that he did intend to attack Mr. Ainslie. The Sessions Judge says that he could have had no better mode of reaching Mr. Ainslie in the buggy than by disabling his horse. I cannot agree with him. I should think that a person wishing to attack Mr. Ainslie would not choose the time when Mr. Ainslie was driving in a buggy to make the attack; and the idea which is suggested against the prisoner, that he intended first to kill the horse, and then attack Mr. Ainslie, is not one which, I should say, did enter into any native's head, or, indeed, any other person's. But, admitting what the Sessions Judge says, it is not satisfactorily proved that the prisoner did try to disable the horse. Mr. Ainslie's own deposition shows that he did not attempt to strike the horse until after Mr. Ainslie urged it on. If the prisoner's attack was premeditated, would he have gone on the road with his back turned towards the buggy, and only have laid hold of the horse when it was nearly upon him, and even then not have struck until Mr. Ainslie urged his horse on? If the act was premeditated, the prisoner would certainly have struck his blow at once on turning round, and not have waited brandishing his knife until the horse was urged against him. I am not satisfied, looking to all the circumstances

that the act was premeditated; but entertain a clear doubt of the prisoner's guilt. It is true, as the Sessions Judge says, that there was no person near when the attack was made, but the road just outside the gate of the Patna Judge's Cutcherry compound can hardly be an unfrequented road. The fact that it was narrow tells in favor of the prisoner more than against his story. The only evidence upon which any suspicion of premeditation rests against the prisoner is his possession of this peculiar knife; and his lame account as to the reason he had it on him, and the ready manner in which he used it. No doubt, as a general rule, a native, in the same predicament as the prisoner, does not use a knife. But the prisoner is one of those creatures whose whole life is not like that of ordinary persons, and whose mind is probably more or less affected.

Although, after giving all the facts of the case my best consideration, I would acquit the prisoner of the charge of deliberate attempt at murder, still I think that he ought not to be unconditionally released. A person who wears such a murderous weapon as the prisoner admits that he is in the habit of wearing, and for the purpose of using it, as he admits, against other persons with whom he has a quarrel, and is of such a violent disposition, either naturally or from indulgence in gunja, that on the slightest imagined provocation he is ready to make use of it, should not be allowed to go at large without some substantial security for his good behaviour. I would therefore direct the Magistrate of Patna to take proceedings against the prisoner under the provisions of Section 297 of the Procedure Code, and to call upon the prisoner as a dangerous character, whose release, without security, would be hazardous to the community, to furnish his own recognizances, and two substantial securities in such sums as the Magistrate may consider proper, and, in default, to keep the prisoner in custody until such time, not exceeding 3 years, as the Magistrate is satisfied that the prisoner can be set at large with safety.

Mr. Justice Glover.—The prisoner has been convicted, under section 307 of the Penal Code, of an attempt to murder Mr. Ainslie, the Judge of Patna, and has been sentenced to rigorous imprisonment for ten years.

The case was originally sent for by the Judge in the English Department. It has since, however, been appealed, so that it

Vol. III. comes before us on the facts as well as on law.

I have gone repeatedly and carefully through the evidence, with a full appreciation of the magnitude of the interests involved, and, in my opinion, it fails to establish the charge.

It is admitted that the prisoner was walking quietly along the road with his back to the buggy, when Mr. Ainslie came out of the Cutcherry compound. It is likewise admitted that, on being called to get out of the way, he walked across the road as natives almost invariably do instead of stepping on one side—still with his back to the buggy. Mr. Ainslie appears to have taken the same side of the road, and thus, to avoid running over the prisoner, was obliged to pull his horse up short. The prisoner, finding himself in this position, suddenly turned round, and seized the horse's bridle, or some other part of the harness, it is not very clear which, and, on Mr. Ainslie's urging the animal on, struck at the horse with a broad bladed dagger-knife; fortunately the weapon lighted on the harness, and the horse was uninjured.

The prisoner then sprang on one side to avoid the wheels, and ran a step or two after the buggy. He was arrested, a few minutes after, as he was going through the bazar, by the police, to whom Mr. Ainslie had in the interim applied for assistance. He held the knife still in his hand, and, when questioned, declared that he had struck no one.

Direct evidence, therefore, of any attempt or intent to murder Mr. Ainslie, there is none. The attack was made solely on the horse, and went no farther; and the question is, is it right to presume that such an attack was a prelude to one intended to take effect on the driver?

The prisoner has been convicted on a series of presumptions. He is presumed to have known that the Judge was behind him, presumed to have got in his way intentionally so as to compel him to stop his horse, presumed to have struck at the animal with the intention of bringing him down, and so leaving the occupant of the buggy at his (the prisoner's) mercy; and lastly he is presumed to have feigned insanity immediately after his arrest in order to escape the consequences of his crime.

But are these fair presumptions on the facts as proved by evidence? The prisoner, a wandering half-crazed faqueer, in a state of semi-abstraction, like all his tribe, is walk-

ing down a rather narrow road; he hears a shout from behind bidding him get out of the way, and he walks across the road for that purpose without turning his head, not knowing what is behind him, and apparently not caring. He suddenly finds himself almost under a horse, and only saved from being knocked down and trampled on by the driver's pulling the animal up short. This is a bare statement of admitted facts, and, under such circumstances, was it an unnatural consequence that the prisoner should have seized the horse by the bridle; and, on the animal's being quickly urged on, should have, in the confusion of the moment, made use of his weapon against it; and is it fair to presume an intention of murdering the occupant of a buggy, because a man in a rage at being nearly run over draws a knife and strikes at the horse? There is not the slightest reliable proof that, at the time of the occurrence, the prisoner knew who was coming, or, indeed, that any one was coming. His back was to the buggy; he never turned round till almost under the horse's feet; he never made the least attempt to attack Mr. Ainslie, but contented himself with stabbing at the horse that had nearly knocked him down. The hypothesis of the prisoner's guilt should flow naturally from the facts proved, and be consistent with them all; and can it be said that the prisoner's acts were so unnatural as to be incredible except on the supposition of his guilty intent? I think not.

The prisoner's mentioning after his capture that the occupant of the buggy was the Hakim of the Adawlut, is no proof that he knew who Mr. Ainslie was at or before the time of the attack on the horse, whilst all the circumstances of the case go to show that he did not know who was behind him.

The presumption that the prisoner got in Mr. Ainslie's way in order to compel him to stop his horse, seems to me altogether untenable. The prisoner was sidling off to the left side of the road, having crossed over apparently from the right; and nothing could have been easier than for the Judge to have gone on the right side instead of the left, and so have avoided the prisoner altogether.

As to the presumption that the man was feigning madness at the time he was captured, I have only to remark that all the witnesses admit that, when arrested, he was in a wild excited state, though not actually intoxicated. As to his exclamations that he

had struck no one, &c., &c.; which have been taken as evidence of guilty intention. they seem to me merely the natural expressions of a man in such a position—at all events they are rather weak grounds on which to build a charge like the present.

Neither can the possession of a dangerous weapon be under the circumstances of the present case any fair presumption against the prisoner. These wandering faqueers often carry similar weapons, and there is nothing to show that he made the slightest attempt to use it against Mr. Ainslie. The evidence that he ran after the buggy muttering is very vague and unsatisfactory, and the most it amounts to is that the prisoner, after springing on one side to avoid being run over by the buggy wheels, made a step or two in the direction of the retreating vehicle.

For these reasons I concur with Mr. Justice Jackson in thinking that the charge of "attempting to murder" is in no wise made out against the prisoner; late events at Patna have apparently given a significance to the present charge which, in my opinion, it in no way deserves.

But, although I would acquit the prisoner of any attempt either to murder or to attack Mr. Ainslie, I consider him a sort of person who ought not to be left at large without ample security for his future peaceable behaviour.

He is evidently one of those half-savage, half-crazy wandering mendicants, whose passions are easily and fatally excited, and, in whose case, the provisions of Section 297 of the Criminal Procedure Code can be most properly and advantageously employed. I concur with my learned colleague in directing the Magistrate of Patna to proceed against the prisoner under that Section.

The 11th June 1865.

Present:

The Hon'ble G. Campbell, E. Jackson, and
F. A. Glover, *Judges*.

Murder.

Queen versus Ram Nath Gwala.

*Committed by the Magistrate, and tried
by the Sessions Judge of Patna, on a*

charge of murder, and sentenced by the Sessions Court to death. Vol. III.

Sentence of transportation for life, instead of death, in a case of murder.

Mr. Justice Jackson. THE only question in this case is the sentence which should be passed upon the prisoner. The evidence proves clearly that he committed the offence of murder. His defence, that he was intoxicated at the time, and did not know what he was about, does not change the nature of the offence. It is still murder. There are two punishments for murder laid down in the Penal Code: death and transportation for life. The evidence leads me to believe that the murdered man and the prisoner had been drinking together, though the Sessions Judge did not make as much enquiry upon this point as he should have done; and that the murdered man excited the prisoner's passion by calling him a thief, the result being that they separated, and the prisoner, obtaining a sword from a neighbour's house, attacked his friend, and killed him. There is no doubt, I think, that, had the prisoner been in his complete senses, he would not have committed the act, and, under the circumstances, it appears to me that a sentence of transportation for life would be sufficient for the ends of justice.

Mr. Justice Glover. I regret to be obliged to dissent from the opinion of my learned colleague.

That the prisoner killed Bollakee, the evidence leaves no doubt; and that the crime was murder, is unquestionable.

I can find no proof on the record that the man was drunk at the time. One witness, the lad Gooja (not examined on oath) deposes that he thought the prisoner was drunk, as he was staggering; but this is opposed to the evidence of Ramruch, who lent him the sword with which the murder was committed. This witness swears positively that the prisoner was not intoxicated when he came to borrow the weapon.

I can find no proof either that the prisoner had been drinking at Madarce Pasee's shop. The deceased's son, who was with his father at the time, says nothing about it, at least not in his evidence to the Sessions Judge, nor does the prisoner call any witnesses to prove the fact.

All that is proved is that the two men abused each other when they met in the shop.

cd. III. Had it been established that the prisoner was drunk at the time of the murder, I would have agreed that, under the circumstances of this particular case, his punishment might have been commuted to transportation for life; but, as there is nothing to shew that he did not kill Bolakee whilst in the full possession of his senses, I see no reason for sparing his life. Whatever provocation he may have received in return for his own abuse of the deceased, it is clear from the evidence that, after having had time to cool down, he went and borrowed a sword, and followed Bolakee for some little distance from the place where they had quarrelled, and then killed him with repeated blows of his weapon.

I would confirm the sentence of death proposed by the Sessions Judge.

Mr. Justice Campbell. Under all the circumstances of the case, and considering how very effective and deterrent a punishment is transportation for life in this country, how near I may say it comes to death, I concur with Mr. Justice Jackson in thinking transportation for life the most appropriate punishment in this case. Sentence will issue accordingly.

find any grounds for reversing the sentence and refunding the fine as proposed by the Sessions Judge. The charge of insulting language under Section 504, in addition to the other charge of criminal trespass, was distinctly mentioned by Mr. Smallwood from the first, and the defendant heard all the evidence to this charge, and was not in any way prejudiced by the absence of any formal charge of using such insulting language. Any such irregularity, therefore, will not, under Section 439 of the Code of Criminal Procedure, vitiate the trial; and, applying Section 426 to this case as one of revision, we do not find that the accused has been really prejudiced by any such error or defect in the trial. The fine may perhaps be excessive, but there was evidence to the use of the bad and insulting language complained of, which would sustain a conviction under Section 504 of the Penal Code, and we cannot interfere on this ground.

On the whole, then, we think that, although the fine is somewhat heavy for the provocation offered, we discern no sufficient illegality to warrant an amendment of the proceedings, and must allow the sentence to stand.

The 12th June 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr,
Judges.

Insulting Language--Criminal Trespass.

Queen versus Raj Koomar Moitra.

Referred under Section 434 of Act XVI. of 1861, and Circular Order No. 18, dated the 15th July 1863.

The mere absence of any formal charge of using insulting language in addition to the charge of criminal trespass is no sufficient illegality to warrant an amendment of the proceedings; the said language having been complained of by the complainant at the first.

We have been through the proceedings in this case, and are of opinion that the delay in disposing of this complaint from August to March inclusive is not accounted for, and is not satisfactory. But we are unable to

The 12th June 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr,
Judges.

Jurisdiction of Deputy Magistrate)--Wrongful confinement and extortion

Queen versus Shamsoudur Ghosal and three others.

Referred under Section 434 of the Code of Criminal Procedure, and Circular Order No. 18, dated the 15th July 1863.

A Deputy Magistrate tried a case which includes a charge of wrongful confinement and extortion, but should follow the rule laid down in Section 279 of the Code of Criminal Procedure.

We concur with the Sessions Judge in thinking that the Deputy Magistrate should not have tried this case, which includes a complaint of wrongful confinement and extortion. We therefore quash his proceeding, and direct him to follow the rule laid down in Section 279, Chapter XVI, of the Code of Criminal Procedure.

The 17th June 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover,

Judges

Theft in Dwelling-house (by Constables) - Witnesses not named by prisoners before Magistrate - Deputy Magistrate not to act as Magistrate and Prosecutor in the same case, and take confessions of prisoners.

Queen versus Boddhath Singh, Mehirkham, and Meert Majid Ally.

Committed by the Deputy Magistrate of Nugrean, and tried by the Sessions Judge of Manipal - Crime charged, Criminal Misappropriation of Property.

These prisoners were employed to guard the house in which they were employed to guard, under Section 380, and not Section 409, of the Penal Code.

According to Section 7 of the Penal Code, a prisoner is entitled to have notice sent and named by him, of the Magistrate summoned at the Sessions trial.

A Deputy Magistrate should not act as Magistrate in a case in which he is the prosecutor, and take confessions of prisoners before him.

Jackson, J. The prisoners were constables employed to guard the house and property of Mr. Rattay, and took advantage of their position to steal some of his property. The stolen articles were either found in their houses or pointed out by them hidden under ground, and, when examined before the Deputy Magistrate, each prisoner admitted his guilt.

They are here represented by a vakeel, who argues that their conviction under Section 409 of the Penal Code is illegal, as they were not charged in any manner with the property which they stole. This objection is entirely good. The wrong Section of the Penal Code has been applied to their case. They could have been convicted under Section 380. There is no ground whatever for interfering with their sentence, which they are now to serve.

It is said that the Sessions Judge, Hon'ble, have sent for the witnesses named by the prisoners at the Sessions trial. Section 177 of the Criminal Procedure Code has provided that, if the accused parties do not name their witnesses when directed to do so by the Magistrate, they are not entitled of right to have them summoned at the Sessions trial. If the Sessions Judge entertains any doubt as to the prisoners' guilt, he should send for the witnesses; if not, it is not incumbent on him to do so. If I had any doubt whatever as to their guilt, I should even now direct

their witnesses to be examined; but I agree with the Sessions Judge that the crime is proved in the clearest possible manner against all the prisoners.

I think the Deputy Magistrate was very wrong to act as Magistrate in the case in which he was himself prosecutor, and to take the confession of the prisoners before himself. In deciding on the guilt of the prisoners, I take no account of those confessions. There is ample evidence without them. However irregular may have been the proceedings of the Deputy Magistrate, the prisoners had a full and proper trial before the Sessions Judge. The irregularities of the Deputy Magistrate do not vitiate the proceedings held by the Sessions Judge (Section 426 of the Penal Code).

The case must go before another Judge, as I would alter the conviction from Section 409 to 380, though I would confirm the sentences passed on the prisoners.

Glover, J. I concur with Mr. Justice Jackson in amending the calendar as proposed. I concur also generally in the view he has taken of the evidence, and think that the prisoners are clearly guilty under Section 380 of the Penal Code. It would be as well if some notice were taken of the Deputy Magistrate's proceedings.

The 20th June 1865.

Present :

The Hon'ble W. S. Seton-Karr, E. Jackson, and F. A. Glover, *Judges*.

Forgery - Jurisdiction - Duty of Judge - Sentence when Judge differs from Jury - Appeal on facts (Offence committed before 1st January 1862).

Queen versus Sheikh Gholam Mustuffa.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Dacca - Crime charged, Forgery.

The accused was charged with forgery of a hib-banamah and of the hakeer's certificate of attestation of the same, and with using as genuine the false hib-banamah and certificate.

Held by Seton-Karr and Jackson, JJ., that it was the duty of the Judge, instead of leaving the question as to the forgery of and using as genuine the hib-banamah to be decided by a competent Court, to have tried that question himself.

Held by Seton-Karr and Glover, JJ., that the accused was entitled to an acquittal on the charge of forgery, as there was no evidence at all; and on the second charge, as the evidence was weak, and the probabilities wholly in the prisoner's favor.

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Vol. III. *Held by Jackson, J., that when a Judge differs from the Jury, he should pass such a sentence as he would have passed had he agreed with the Jury.*

Jackson, J. THE prisoner has been convicted of the offence of forging a false Certificate of Attestation on the back of a Hibbanamah, purporting to be a transfer of certain landed estate in his favor from his wife, Musst. Ojahunnissa. The sentence passed upon him is one year's rigorous imprisonment.

The prisoner was committed for trial by Baboo Ramkoomar Bose, Deputy Magistrate, of three separate charges:—*First*, the Forgery of the Hibbanamah; *Secondly*, the Forgery of the Dacca Town Kazee's Certificate of Attestation; *Thirdly*, the using as genuine the false Hibbanamah and Certificate.

The Sessions Judge, Mr. Abercrombie, has taken no verdict from the Jury as respects the first and third charges, and he differs from the verdict of the Jury as respects the second charge. To this may probably be attributed the very lenient sentence which has been passed. The Judge should, however, even when he differs from the Jury, inflict such a sentence as he would have passed had he agreed with the Jury. He may take other measures to obtain the release of the accused, if he considers that the accused is not guilty, or that the charge against him is not proved.

I regret to have to record that the enquiries made in this case, both by the Deputy Magistrate and the Sessions Judge, have been most defective and insufficient; and this is the more reprehensible where the Sessions trial has to be conducted with the aid of a Jury. Fortunately, in this case the verdict of the Jury is not final, as the offences of forgery were committed before the Penal and Procedure Codes came into force; and under Act XVII. of 1862 the prisoner is entitled to an appeal on the facts as well as the law.

The proceedings in this case appear to have originated by the prisoner, who charged the complainant, one Bakuroollah, with having, in collusion with the prisoner's wife, set up a false howalah in order to set aside the prisoner's hibbanamah. Upon this Bakuroollah charged the prisoner with forging the hibbanamah to set aside his howalah. Both documents bear old dates. Both parties assert that they have been in possession of the estate in dispute. But the Deputy Magistrate appears to have made no enquiry to ascertain whether Bakuroollah's howalah was really executed at the time and place alleged,

or whether Bakuroollah has been in possession under the howalah. The Town Kazee denied that he had recorded the attestation on the prisoner's hibbanamah; and upon this the Deputy Magistrate has jumped to the conclusion that the hibbanamah is the forged document. The sole evidence offered at the trial has been that of Bakuroollah, who deposes that his deed is genuine, and the prisoner's deed is forged; that of the Town Kazee, who, in so many words, deposes that the attestation on the hibbanamah is forged, though there are, the Judge says, suspicious signs of an interpolation in his Registry Book, at the page at which this hibbanamah ought, if genuine, to have appeared, but where another deed is registered; and, lastly, that of a servant of the prisoner, who deposes that he never heard of the hibbanamah. Such evidence is most insufficient to prove the offences charged. The Sessions Judge should not have proceeded with the trial upon it; but have ordered further enquiry. But the prisoner having been committed to the Sessions with these forgeries, the Judge cannot, as he has done, pass over the charges of forgery, and using as genuine the hibbanamah. The Judge, in his address to the Jury, says the question as to the forgery of the howalah or the hibbanamah must be left to be decided by a competent Court. This shows great misapprehension of his duties by the Sessions Judge. There is no Court, but his Court, competent to try that question of the forgery. The prisoner has been committed to his Court for trial, and still he does not try the prisoner.

The case should, I think, be remanded to the Sessions Judge with directions that he will order the Magistrate of the district (as the Deputy Magistrate seems not to understand his duties in this respect) to take up the enquiry, and to make a full and searching investigation into the charges of forgery brought against the prisoner, and also into that brought by the prisoner against the complainant. Bakuroollah's sole and unsupported complaint is no proof against the prisoner, and the Town Kazee's statement should be tested in every possible way. It is an extraordinary circumstance that even Musst. Ojahunnissa was not cited to give evidence before the Sessions Court. In fact, I have never yet seen a case committed to the Sessions so utterly unsupported by evidence as this case, and I must record that I think both the Deputy Magistrate and the Sessions Judge much to blame for their

proceedings on the preliminary enquiry and at the trial respectively.

The Judge should, I think, be required to re-try the prisoner after all the evidence against him has been obtained with the same Jury with which the first trial was held, and to take from them a verdict, either of conviction or acquittal, on the charge on which as yet he has taken no verdict; and as respects the charge on which he has taken a verdict, the proceedings must be again referred to this Court.

In the meanwhile, the prisoner should be placed on bail.

Glover, J. The forgeries of which the prisoner is accused are alleged to have been committed before the 1st January 1862; consequently, by Section 4 of Act XVII. of that year, the prisoner is entitled to a hearing on the facts of the case, the Jury's verdict notwithstanding.

He was charged—*1st*, with forging a hibbanamah; *2ndly*, with forging the Dacca Kazee's Attestation of Registry on that document; and, *3rdly*, with knowingly using the document as genuine. The Sessions Judge took the Jury's verdict on the *second* count only, that of forging the Kazee's certificate. On that count he sentenced the prisoner to one year's imprisonment, *noting* at the same time that he considered the evidence too weak for conviction.

My colleague would remand the case for further enquiry on all the charges. I concur with him that the case has been improperly conducted from the first; and that the authorities concerned are deserving of censure; but I could not remand the case for the following reasons:

Firstly.—There appears to me no necessity for re-opening the question of the authenticity of the hibbanamah. The prosecutor Bakuroollah never ventured to say it was a forgery, or that it had not really been given to the prisoner by his wife: his statement was that the document had been, he thought, collusively executed between the two in order to defraud him of his purchased rights. The prisoner is entitled to the benefit of the weakness of the case for the prosecution, and there is neither proof nor assertion that the hibbanamah is a forgery. The charge ought never to have been made.

Secondly.—I think that the evidence regarding the forged attestation is altogether too weak to support a conviction. The Kazee himself gives his evidence in a very suspicious and unsatisfactory way: he is unable to deny that the impression of his large seal is

genuine, though he professes ignorance as to how it came there. On referring to page 9 of his Register Book, I find the most palpable evidence that the leaf on which the hibbanamah should have been written has been tampered with: it is an evident interpolation; the place where the new leaf has been gummed on to the narrow remnant of the old is distinctly visible: there is no other leaf in the book so marked; in short, no one that saw the condition of pages 9 and 10 could hesitate for a moment in saying that a new leaf has been interpolated. The evidence in support of the charge is that of the Kazee alone. Against it are the depositions of three witnesses who swear distinctly to the fact of registration by the Kazee himself; these men point out their names on the document as attesting witnesses, and their evidence is in no way rebutted; on the contrary, it receives very considerable corroboration from the appearance of the Register Book at the place where the copy of the deed ought to be, but is not.

I would acquit the prisoner on the *second* count for these reasons.

On the *third* there can, of course, supposing that I am right in crediting the prisoner's story regarding the attestation, be no conviction.

And, therefore, as I said before, I see no reason for remanding his case, but would direct the prisoner's release at once.

Salon-Kari, J. I concur with Mr. Justice Jackson in thinking that the case has been most carelessly prepared by the Deputy Magistrate, and that the Sessions Judge ought to have known that it was the duty of his Court, and of none other, to decide the question of forgery or no forgery in the first Court.

But it is still the business of the prosecutor to offer some evidence of the forgery, and there is really none offered, and nothing to lead us to suppose that the deed of hibba is other than a deed between man and wife; collusive, it may be, but not forged. Indeed, the evidence of Bakuroollah in reality only amounts to such a charge of collusion.

The turning point in the case is, however, the Registry Book of the Kazee and this functionary's evidence. It is palpable, as Mr. Justice Glover observes, that a fresh page has been introduced in the very page in which the prisoner's hibba, which bears the mark of No. 214 on its face, ought, by his account, to have appeared. Now, it is perfectly incredible that the prisoner could have put the number of 214 on his account by mere

Vol. III. guess, and then that this number, so guessed at, should be found to hit the one single page in the Registry Book which has been manifestly interpolated. It is clear to me that there has been some rogues in the Kazee's Office, and the explanation given by this functionary is altogether weak and unsatisfactory. I am quite satisfied that a Jury, with a proper knowledge of their duties and an ability to weigh evidence, would have at once acquitted the prisoner on this one startling fact of the interpolation alone. The second charge, of course, carries with it the third also.

Holding, then, that the prisoner is fully entitled to an acquittal on this second charge, and that there is no *prima facie* case to require any further investigation on the first charge, I concur with Mr. Justice Glover, and release the prisoner. The hibba should be restored to the prisoner.

The 21st June 1865.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr,
Judges.

Cheating or Extortion (by Chowkeedar).

Queen *versus* Ramnarain Chowkeedar.

Referred under Section 434 of the Code of Criminal Procedure and Circular Order No. 18, dated the 15th July 1863.

A chowkeedar, who obtains money from another, either by fraudulent inducement or dishonesty, or by putting that person in fear of injury, is punishable under Section 417 of the Penal Code (Cheating), or Sections 383 and 384 (Extortion), but not for criminal misappropriation of public money entrusted to him as a public servant.

We cannot concur with the Sessions Judge in thinking that this offence should have been punished as criminal breach of trust. On the facts found by the Deputy Magistrate, the offence seems punishable under Section 417 of the Penal Code as cheating, or it may fairly fall under extortion under Sections 383 and 384.

The chowkeedar can never be said to have appropriated public money entrusted to him as a public servant. The money was clearly obtained by him either under fraudulent inducement or dishonesty (Section 417), or by his putting Haro Gwalini in fear of injury, and so inducing her to deliver up money to him (Section 383). In either view we see no reason for remanding or alter-

ing the conviction, though the punishment seems inadequate to the offence.

The 21st June 1865.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr,
Judges.

Trespass (false charge of).

Sibnarain Paul and others

versus

Ram Rutton Dutt, Sodagur Singh, and others.

Criminal Reference made by the Officiating Sessions Judge of Rajshahye in his letter No. 291, dated the 8th instant.

A charge of trespass against persons in possession of land decreed to another, whether notice of the decree has been given to the alleged trespassers or not, is not necessarily "frivolous, vexatious, and false."

On the facts recorded, and on the finding come to by the Joint Magistrate, we do not gather that the lands, in regard to which the case occurred, were other than a part of the lands duly awarded to Anundo Mohun Mitra by a decree of the High Court, and duly delivered over to him in execution of decree. The Joint Magistrate nowhere says that any encroachment had been made by Anundo Mitra on other lands of the defendant, and over and above the lands awarded by the civil decree. In this state of things, what the Joint Magistrate says about some notice being due to the defendant on the part of the person successful in the Civil Court is irrelevant. This being so, the defendants are shewn to have trespassed on lands awarded by a decree to the employer of the plaintiff Nawai Mundul, and to have given a foundation for the charge laid; and, though the proceedings of the defendants do not appear to have been characterized by any violence or extravagance, there is, on the other hand, nothing whatever to justify the Joint Magistrate in terming the complaint "frivolous, vexatious, and false" and still less to warrant his inflicting a fine of 25 rupees.

We, therefore, hold that the complaint of Nawai had quite grounds sufficient to warrant its institution, and that the imposition of a fine was unwarranted and illegal, and we hereby remit the same. We observe that this reference has not been submitted in the form prescribed by Circular Order No. 18 of 15th July 1863.

The 21st June 1865.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr,
Judges.

**Contempt of lawful authority of public servant—
Mock bidding for lease of Ferry sold by Magistrate.**

Queen *versus* Reazooddeen and others.

*Reference made by the Sessions Judge of
Tipperah, under Section 434 of Act
XXV. of 1861, and Circular Order
No. 18, dated the 15th July 1863.*

A person is guilty of contempt, under Section 185, Penal Code, by bidding for the lease of a ferry sold at public auction by the Magistrate, and failing to complete the sale.

The parties in this case have been punished under Section 185 of the Indian Penal Code, which enacts that a party bidding at a sale of property, held by lawful authority of a public servant, and not intending to perform the obligations under which he lays himself by such bidding, shall be punished, &c., &c.

The parties bid for the lease of a ferry sold at public auction by the Magistrate, and failed to complete the sale. The Magistrate rightly or wrongly found, on the evidence, that they had done so in the hope of obtaining the lease on a re sale at a lower rate, and fined them rupees 10 each. The Sessions Judge thinks that the law does not contemplate a sale of this kind, but only a sale of corporeal property, for so we gather from his letter. But to answer the question put by him, it is necessary to look to the object of this Chapter of the Penal Code, which is headed "Contempts of the Lawful Authority of Public Servants."

Now, we think, a party can equally show contempt by bidding for the lease of a ferry put up to public auction by a Magistrate, as he can by bidding for any corporeal property, not intending to perform the obligations under which he lays himself by such bidding. It is his intention at the time of bidding, and not the nature of the thing to be sold, which constitutes the offence. We think, therefore, that, if the intention were proved, the Magistrate's order, under Section 185, was correct.

The 21st June 1865.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr,
Judges.

No Recognizances (from persons acquitted).

Queen *versus* Anund Chunder Chuckerbutty and Hur Chunder Chuckerbutty.

Recognizances are not necessary from persons acquitted by the Sessions Judge.

Two references have been made by the Sessions Judge of Backergunge under Section 434 of the Code of Criminal Procedure regarding the parties noted in the margin,* who were sentenced to a fine of rupees 1,000 for the offence specified in Section 155 of the Indian Penal Code, and were further bound down in recognizances of rupees 1,000 to keep the peace for one year. As the parties have been acquitted by the Sessions Judge, the charge against them not being proved, we concur with him in thinking that there are no grounds for requiring these recognizances, and, under the provisions of Section 404 of the Code of Criminal Procedure, we reverse the order of the Magistrate requiring them.

* Hur Chunder Chuckerbutty and Anund Chunder Chuckerbutty.

The 21st June 1865.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr,
Judges.

District Municipal Act—Levy of fines by Joint Magistrate—Record of proceedings—Obstructions—Not keeping ground clean.

*Reference made by the Sessions Judge of
the 24-Pergunnahs under Section 434 of
Act XXV. of 1861, and Circular Order
No. 18, dated the 15th July 1863.*

A Joint Magistrate, though Vice-Chairman of a Municipal Committee, can impose fines under Act IV. of 1864, B. C.

The Joint Magistrate should make a record of his proceedings before passing sentence.

The obstruction of a drain by a tree blown down by the Cyclone is not an obstruction within the meaning of Section 57 of that Act.

The owner of ground is answerable under Section 67, whether his ground was made dirty by himself or another.

The District Municipal Act is silent as to the authority by whom fines under the Act are to be imposed; but we think there can be no doubt that the Magistrate is the proper authority, and, therefore, the Joint

Vol. III. Magistrate, though Vice-Chairman of the Municipal Committee, is competent to impose fines on charges being brought and proved before him. We agree with the Sessions Judge that the Joint Magistrate should make a record of his proceedings, taking down in writing the statement of the party charged, and, when necessary, the evidence against and for the accused; but if, on visiting a locality, the Joint Magistrate has ocular demonstration that an offence has been committed, we think it would be sufficient for him to know and to record what the party charged with the offence had to say, and then proceed to pass sentence.

With regard to the fine imposed by the Joint Magistrate, under Section 57 of Act III. of 1864, Bengal Legislature, we think the Joint Magistrate's order illegal as the tree which obstructed the drain was blown down by the Cyclone, whereas the Section quoted refers to some obstruction raised purposely by a party. It is questionable whether the Municipal Committee were not bound to remove this obstruction at their own cost. If the party wished to retain the wood, he would be bound to remove it after due notice, and, if he failed to do so, the Committee might do so.

We remit this fine.

We think the Joint Magistrate was right as regards his orders under Section 67 of the Act. It is no valid excuse for a man, who is bound by law to keep his ground clean, to say: "I did not make it dirty, but somebody else did."

The 24th June 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr.

Judges.

Absconding parties.—Proclamation and attachment of property (not authorised for offences punishable with 6 months' imprisonment)—Sections 183 and 184, Criminal Procedure Code.

Queen versus Muddun Mohun Podar.

Appeal against the order of the Sessions Judge of Backergunge, affirming that of the Joint Magistrate.

Sections 183 and 184, Criminal Procedure Code (proclamation and attachment of property of absconding parties), do not apply to offences punishable with imprisonment extending to six months only.

There is no rule which requires a Magistrate to satisfy himself that a party has absconded, before

issuing a proclamation; but the party, on suing to recover his property, may prove by evidence that he had not absconded.

Before a Magistrate proceeds to declare attached property forfeited, he should take evidence to prove compliance with the formalities laid down by law with regard to proclamation.

In this case two objections are taken:—*1st*, that the offence with which the petitioner is charged being punishable only with fine commutable, under Section 69 of the Indian Penal Code, to imprisonment not under any circumstances exceeding six months, the Magistrate acted contrary to law in proceeding against him under the provisions of Chapter XIV. instead of Chapter XV. of the Code of Criminal Procedure; *2ndly*, that the petitioner did not attempt to evade process, and the issue of the proclamation under Section 183 has not been made in the manner required by law.

The petitioner is charged under Sections 154 and 155 of the Penal Code, and a warrant was issued by the Joint Magistrate on 5th September for his apprehension. The return of the Inspector of Police was to the effect that the petitioner was then at Burisaul, and he requested instructions whether the warrant should be sent there to be served. On 5th September the Joint Magistrate issued a proclamation under the provisions of Section 183 of the Code of Criminal Procedure, and at the same time directed the attachment of the petitioner's property, which, on the 12th October, the Joint Magistrate declared to be at the disposal of Government, as the petitioner failed to appear within the time limited in the proclamation.

The first objection raised is one of law. The petitioner urges that the offence described in Sections 154, 155, and 156 of the Indian Penal Code is punishable with fine only commutable by Section 67 to imprisonment for six months, if the fine exceed 100 rupees; that for offences punishable by a Magistrate with imprisonment for a period of more than six months, under Chapter XIV. of the Code of Criminal Procedure, the provisions of Chapter XII. for causing the attendance of the accused are made appealable by Section 249; but that the provisions of that Chapter are not extended to offences punishable under Chapter XV. with imprisonment extending to six months. In such cases the usual course is, first a summons, and then a warrant, or, should the circumstances require it, a warrant is issued in the first instance; if the accused be not apprehended under the warrant, the only course to be taken

is for the Magistrate to re-issue it; but he is not empowered, under the law, to take further proceedings for causing the attendance of the accused, such as proclamation and attachment, as the provisions of Sections 183 and 184, Chapter XII., have not been extended to cases triable under Chapter XV., though other Sections of that Chapter, to secure the attendance of witnesses, have been. The Legislature showing by the marked omission that it did not intend to extend the provisions of Sections 183 and 184 to offences punishable with imprisonment up to six months.

It has already been ruled by the Court, on a reference made by the Judge of Bhaugulpore,

High Court to Judge
of Bhaugulpore, 28th April
1865.

noted in the margin,
that the provisions of
Sections 183 and 184
do not extend to cases

triable by a Magistrate under Chapter XV. of the Code of Criminal Procedure, and it appears to us that the Legislature purposely made the omission, considering that for cases falling under this Chapter, which are generally of a petty nature, and where the usual course of obtaining the attendance of the accused is by summons, it was enough to enforce that attendance by the further process of a warrant, and ordinarily the issue of a warrant is sufficient for that purpose. As, therefore, the offence with which the petitioner is charged is punishable by fine commutable to imprisonment extending to six months, we think the provisions are not applicable to this case, and all proceedings taken under them must be quashed.

It is urged, further, that, looking at the return made by the Police Officer, it is clear that there was no attempt, on the part of the petitioner, to abscond. Both the Magistrate and Sessions Judge have found, as a fact, from the evidence and the acts of the petitioner, that he did endeavour to abscond. Though the Police Officer's return is made in language which might lead to the supposition that the petitioner had gone to Burrisaul in the ordinary course of his business, yet, if the Magistrate were satisfied that he intended to abscond to avoid the service of the warrant, he had authority to issue the proclamation, if this had been a case in which such procedure were authorized by law. The law does not lay down any rule which a Magistrate must take to satisfy himself that a party is absconding before issuing a proclamation; but, of course, it is open to the party suing to recover his property, under Section 185 of the Code of Criminal Pro-

cedure, to prove by evidence that he had not done so. **Vol. III.**

Then, as regards the objection, that the proclamation was issued without due formality, we observed that the law (Section 183) requires that "the proclamation shall be publicly read in some conspicuous place of the town or village in which such person usually resides, and shall be affixed on some conspicuous part of the ordinary place of abode of such person, or on some conspicuous place of such town or village," and that "a copy of the proclamation shall also be affixed on some conspicuous part of the Court-house of the Magistrate." The law has laid down the above rules as necessary formalities for the due issue of a proclamation; and before the Magistrate proceeds to declare attached property to be at the disposal of Government, he should take evidence to prove that these formalities have been duly complied with. The return of a Police Officer, though sufficient to enable the Magistrate to do certain acts, is, we think, insufficient to authorize his inflicting a heavy penalty on the accused; for such, no doubt, is the forfeiture of property, and, therefore, the fact of the issue of the proclamation with all formalities should be proved like any other fact: for the object of the proclamation being to inform the accused that his attendance is required; the object of these formalities is to ensure a due proclamation of that proclamation, so that the accused may not be able to say that neither he nor any of his people were aware that his attendance was required by the Magistrate. In this case, however, the petitioner admits that he was aware of the issue of a warrant, and applied to the Magistrate to appear by agent before the period entered in the proclamation had expired, and in time to admit of his appearing in person when that application was rejected, so that he could not plead ignorance; and, had this been a case to which the provisions of Sections 183 and 184 were applicable, we should have rejected the appeal. As it is, we must reverse the orders of both the Lower Courts.

The 26th June 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, Judges.

Witnesses for the defence (examination of).

Referred under Section 434 of Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Cr. 25.

M. 111.

Queen versus Abdool Setar.

An accused person is entitled to have the witnesses, named in his defence, examined.

READ a reference from the Sessions Judge of Hooghly, dated 19th instant.

We entirely concur with the view taken of this case by the Sessions Judge. The accused in the case of the *Queen versus Abdool Setar* is clearly entitled to have the witnesses (whom, we observe, he distinctly named in his defence) examined.

The provisions of Circular Order No. 18 of the 12th December 1861 do not apply to this case. The present case was not one necessarily triable in the Sessions Court, and the accused had, therefore, no opportunity of citing witnesses at a later stage of the case and before a higher tribunal. The order and sentence passed by the Deputy Magistrate is annulled. The records of the case must be returned with directions that the witnesses for the defence of the accused be examined, and a proper order passed.

The 26th June 1865.

Present :

The Hon'ble F. B. Kemp, *Judge*.

Theft in dwelling-house, &c.—Whipping.

Queen versus Junghoo Khan and Tussuduk Hossein.

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Palna, on a charge of "Theft."

Whipping may be substituted for any other punishment for the offence of theft in a dwelling-house, &c.

This trial was conducted with a Jury.

The petition of appeal raises no point of law.

The conviction and sentence appear to be legal, and, under all the circumstances, the punishment awarded is not too severe. The appellants were convicted of seven distinct offences under Section 380 of the Indian Penal Code. The infliction of stripes under the provisions of Section 2, Act VI. of 1864, in lieu of any other punishment, is legal for an offence defined by Section 380 of the Indian Penal Code. It was not an additional punishment.

The appeals are rejected.

The Sessions Judge should have sent a copy of his charge to the jury with the petition of appeal.

The 26th June 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges*.

Dismissal of case by Deputy Magistrate for default.

Queen versus Chundrai Sikdar and others.

Referred under Sections 347 and 435 of the Code of Criminal Procedure.

The Deputy Magistrate did not act illegally in dismissing the case when the complainant did not appear on the day fixed.

In this case we concur with the Sessions Judge that Section 180 of the Criminal Procedure Code does not apply.

The Deputy Magistrate did dismiss the case, because there was no ground for proceeding with it. The Section under which the case was dismissed, because the complainant did not appear with his witnesses on the day appointed, appears to be Section 259; and there can be little doubt that, under the strict letter of the law, the Deputy Magistrate was justified in dismissing the case under that Section when the complainant was not present, though there had been no question, till then, of the appearance of the accused.

We think that the Deputy Magistrate would have exercised a sounder discretion had he waited a short time to see if the witnesses would appear, or if he had not dismissed the case until the close of the day; but, looking to the statement of the complainant, it does not seem that the charge was of an aggravated nature, or that any great violence had been exercised on the complainant.

Had the charges been of a kind exclusively triable by the Court of Session, the Sessions Judge might himself have dealt with the case under Section 435 of the Criminal Procedure Code. The offences charged were not necessarily triable at the Sessions. But charges under either Section 342 or 347 of the Penal Code are triable by the Magistrate, and, under all the circumstances, we do not think that anything more need be done. The Sessions Judge should furnish the Deputy Magistrate with a copy of our opinion for his guidance in future.

The 27th June 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, Judges.

Abetment—Issue of false certificate of Summons.

Queen versus Hissamuddeen.

Committed by the Magistrate of Bancoorah, and tried by the Sessions Judge of West Burdwan, on a charge of abetment of issuing a certificate required by law to be given, knowing it to be false on a material point.

Abetment of the issue of a false certificate of summons. Although there was no chowkeedar in the village of the name appearing on the receipt acknowledging due service, the prisoner was acquitted in the absence of proof of guilty knowledge of belief, it being probable that he (an utter stranger in the village) was deceived by the villagers.

THIS is a novel case, and, as such, I have very carefully perused the whole of the proceedings in the original vernacular.

The prisoner is a peadah of the Bancoorah Collectorate. It appears that he had held that office for six or seven months prior to the present trial. The facts of the case appear to be briefly as follows. One Motee Loll Roy brought a suit for arrears of rent for the years 1268, 1269, and 1270, amounting to rupees 117-10-18-1, against Gopal Pari and Rooplall Pari. The issues raised in the suit upon the pleadings were: *First*—Is the jumma of the defendants payable in sicca or Company's rupees? *Secondly*—Is the arrear or any portion of it due or not? The Assistant Collector dismissed the suit, holding that the jumma was payable in Company's rupees, and that the arrears were not due; special damages were awarded to the defendants under the provisions of Act VI. of 1862. In appeal the decision of the Assistant Collector was affirmed.

It appears that, in the answer of one of the defendants, or Rooplall Pari, before the Assistant Collector, the said party averred that the summons had not been served upon him personally, or affixed to the door of his house, and that he should have known nothing of the suit had he not casually heard of its institution. He further alleged that there was no such chowkeedar in the village in which he resided as Modoo Mytee, whose name appears as a witness on the receipt, acknowledging the due service of the summons, the chowkeedar of the village being one Seeboo Dome.

Upon this the Assistant Collector held a proceeding, and made over the prisoner, the peadah Hissamuddeen, to the Magistrate.

The Magistrate, Mr. Wells, after taking the answer of the peadah, and evidence to the fact that there was no chowkeedar by name Modoo Mytee, committed the prisoner to take his trial on the following charge before the Sessions Judge:—"With voluntarily causing the Nazir of Bancoorah Collectorate to sign or issue a certificate required by Section 46 of Act X. of 1859, knowing that such certificate was false in a material point; and that he has thereby committed an offence punishable under Section 197 of the Indian Penal Code, and has committed an offence punishable (*sic in orig.*) under Section 109 of the Indian Penal Code within the cognizance of the Court of Session."

As the Magistrate's grounds for committing the prisoner are very brief, I extract them :

"There can be no question, I think, that the accused never visited the village or served the process, which he gave the Nazir to understand he had duly executed."

The Sessions Judge, Mr. W. T. Tucker, found that the offence established against the prisoner was—

"Abetment of the issuing of a certificate required by law to be given, knowing such certificate to be false in a material point."

The sentence passed is one year's rigorous imprisonment.

The gist of the offence in this instance is clearly the intention of the prisoner. The question is, did the prisoner know or believe that the certificate of service of summons which he filed was false in a material point? I think that the prisoner is entitled to an acquittal. It is not disputed that he was an utter stranger in the village in which the parties to the Act X. suits resided. It is also clear that he is a peadah of some few months' standing, knowing nothing of the parties; he goes to the village, the house of the defendant in the Act X. suit is pointed out to him by the plaintiff—a house said to be the residence of the defendant. The defendant is not found at home; the prisoner affixes the summons to the principal door of the homestead, and gets a receipt signed by a party styling himself chowkeedar. It may be that there is no chowkeedar in the village of the name of Modoo Mytee, but that there is a Modoo is admitted. Nothing is, therefore, more probable than that the peadah, the prisoner, was told by somebody on

Vol. III. behalf of the plaintiff, who wished to have the suit tried *ex parte*, that the witness Modoo was a chowkeedar. Not being able to satisfy myself of the guilty knowledge or belief of the prisoner, I would acquit him. The papers must be submitted to my colleague, Mr. Justice Seton-Karr.

Seton-Karr, J.—It seems very remarkable that, after all the alleged non-service of the summons, the defendants in the rent-case did appear, and did answer the plaintiff's claim.

I distrust the statement that the summons was never served, and that they only heard by chance of the rent-case. Now, the statement is the sole foundation for the trial and eventual conviction of the peon for abetment of the issue of a false certificate.

I think the peon's story consistent and probable, and at any rate this is a case in which he is fully entitled to any reasonable doubts; my own belief is, that he served the summons which he had no interest in not serving, and was deceived by the villagers, who gave him false names. The prisoner is released.

The 29th June 1865.

Present:

The Hon'ble F. A. Glover, *Judge*.

Records of previous convictions (to be put in at close of trial).

Queen versus Shiboo Mundle.

Committed by the Deputy Magistrate of Burdwan, and tried by the Sessions Judge of West Burdwan, for theft, &c.

Records of previous convictions should not be put in until the close of the trial, as they can only be used after conviction in determining the measure of punishment.

This is a clear case. The prisoner was caught making off with the stolen bullocks, and, on being questioned about them, made his escape, leaving the animals behind him; he was followed, and again questioned, but again he contrived to make off. His defence is enmity—a plea not in the least established. Against him is the abundantly proved fact, that he was found making off with the bullocks, which had been stolen some days previous, and that he not only refused to give any account of the animals, but ran off directly he was questioned.

He appears to have been once before imprisoned for cattle-stealing. I see no reason, therefore, to interfere with the conviction

under Section 411 of the Penal Code, and reject the appeal.

I remark, however, for the Sessions Judge's future guidance, that records of previous convictions should not be put in until the trial is concluded. The previous conviction of the prisoner for cattle-stealing could have been no proof against him in the present case, and could only have been used after conviction in determining the measure of punishment.

The 4th July 1865.

Present:

The Hon'ble C. Steer, *Judge*.

Destruction of a valuable security—Tearing a pottah.

Queen versus Nittar Mundle.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of defacing a document purporting to be a valuable security, under Section 477 of the Indian Penal Code.

The tearing up of a pottah is the destruction of a valuable security within the meaning of Section 477 of the Penal Code.

THE evidence establishes that the prisoner took and tore up a pottah, and that is a document which is a valuable security. The conviction and sentence under Section 477 is legal, and there is no ground for the appeal.

The 6th July 1865.

Present:

The Hon'ble F. B. Kemp, F. Jackson, and F. A. Glover, *Judges*.

Murder—Culpable Homicide not amounting to Murder.

Queen versus Beria Bazikur and another.

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Rungpore, on a charge of Culpable Homicide, under Section 304 of the Indian Penal Code.

The Sessions Judge, having found the prisoners guilty of striking the deceased with the knowledge that the act was likely to cause death—in other words, guilty of murder—convicted and punished them for culpable homicide not amounting to murder. Case remanded for a new trial (*Jackson, J.*, dissenting).

Glover, J.—THE Sessions Judge has convicted the prisoners of culpable homicide not amounting to murder, under Section 304 of the Penal Code, and has sentenced them to five years' rigorous imprisonment.

This conviction is opposed to the evidence and to the Sessions Judge's own summing up. He finds the prisoners guilty of striking the deceased with "the knowledge that the act was likely to cause death." This is specially the meaning of Clause 4 of Section 300 of the Penal Code, and, under that Section, the crime held by the Sessions Judge to be proved against the prisoners is not culpable homicide not amounting to murder, but murder itself.

It has already been ruled by this Court in the case of Jobur Mahomed and another, dated 28th December 1864, that, where a conviction is, from the Sessions Judge's own showing, erroneous in law, the case should be remanded with directions to record a legal finding on the evidence, and to pass sentence in accordance therewith; as this Court, although empowered by Section 419 of the Code of Criminal Procedure to alter the finding and sentence of the Sessions Judge, could not impose the lightest of the punishments allowed by law for the crime of which the prisoner had been really convicted without enhancing that already imposed.

Following this precedent, I think that this case should be sent back to the Lower Court, with directions to come to a legal finding on the evidence which the Judge admits to be trustworthy, and to pass such a sentence as the law directs. In the present case, the prisoners have been found guilty of murder, although the conviction and punishment have been for culpable homicide not amounting to murder.

Jackson, J. I would not remand this case. There was an altercation between the prisoners and the villagers. The prisoner's witnesses say that, as they were passing along the road (a large encampment of women and cattle), the cattle strayed with the villagers into the villagers' field. The villagers state that the prisoners and their women went into the field to eat the sugar-cane, and that, in the dispute which ensued consequently, the prisoners struck the blows, one of which caused the death of one of the villagers. The Civil Surgeon's evidence proves that only two blows were struck, but that one of them was very severe, penetrating to the brain, and fracturing the skull. It does not appear in evidence which of the prisoners struck this blow, and the witnesses all depose that it was a blow with a *lattee*, and not with any cutting instrument. There is no proof that the prisoners received any provocation before they assaulted the villager who was killed. The villagers will not

mention that circumstance, and the prisoners deny that they killed the man, or had any dispute with him personally. But, looking to all the circumstances that there were only four men belonging to the prisoner's party, and a very large number of women and cattle, I doubt if the prisoners would have attacked the villagers unless they had been provoked in some way. Had the Sessions Judge made a more careful examination of the prisoner's witnesses, I feel certain this would have been elicited.

However this may be, I am not satisfied that the prisoners who struck the blow either intended to cause death, or struck it with the intention of causing such bodily injury as was likely to cause death.

We must look to all the circumstances of the case to see what the prisoner's intention was, and there is no evidence whatever upon which it is satisfactorily proved to my mind that the prisoners in any way intended to cause death or bodily injury sufficient to cause death. But the prisoner, who struck the blow which killed the villager, must have known that a blow on the head with a *lattee* was likely to cause death; and as he chose to run the risk of inflicting this blow, he committed the offence of culpable homicide, and his companion, who was present abetting in the assault, committed the same offence. As it is not certain which prisoner inflicted the blow which caused death, I would reduce the sentence of three years' imprisonment. It does not appear to me to be a case calling for severe punishment.

Kemp, J. I entirely concur with Mr. Justice Glover. This appears to me to be a very bad case. The two prisoners, who belong to a wandering tribe, gipsies, entered a sugar-cane field for the purpose of plundering it. The villagers, and amongst them the deceased, naturally remonstrated. The prisoners then and there set upon the villagers, and killed the deceased; his skull was fractured. The Sessions Judge, Mr. Fowle, in his remarks, observes "that the Court cannot but look upon such violent use of a heavy weapon like a bamboo in any other light than an act done with the knowledge that it was likely to cause death." I cannot understand how the Sessions Judge could convict of any offence short of murder, when he was of opinion that the act done was so imminently dangerous that the knowledge that it was likely to cause death must be inferred. (*See Explanation, Section 300 of the Indian Penal Code.*)

Vol. III. My learned colleague, Mr. Justice Glover, proposes to send back the case in order that the Judge may come to a legal finding.

I would, acting as a Court of Revision, under Section 405, order a new trial. The prisoners have not pleaded to the graver charge of murder; the charge must, therefore, be remanded, and the provisions of Sections 244, 245, 246, and 247 of the Code of Criminal Procedure carefully attended to. After recording the pleas of the prisoners, the Judge will pass a legal sentence.

Glover, J.—After reading the remarks of Mr. Justice Kemp, I concur with him in remanding the case for a new trial.

The 7th July 1865.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Murder—Culpable homicide not amounting to Murder.

Queen *versus* Mahomed Elim Abdool
Kurreem and Abdool Ghunee.

Committed by the Magistrate, and tried by the Sessions Judge of Sylhet on a charge of murder.

The absence of premeditation will not reduce the crime for murder to culpable homicide not amounting to murder.

Glover, J.—The evidence in this case has been recorded by the Sessions Judge in a very meagre and unsatisfactory way; and had the matter been one of any difficulty, I should have felt obliged to remand the case for a more complete enquiry. There can be no doubt, however, that the deceased met with his death at the hands of the prisoners, and the only point for consideration is, of what degree of homicide the prisoners are guilty?

The Sessions Judge has convicted them under Section 304 of the Penal Code, on the ground that the killing was not premeditated; but in this he has committed an error of law. The Penal Code nowhere makes premeditation a necessary concomitant to murder. Whatever the motive may be, or whether or not any motive whatsoever be discoverable, the sole point for enquiry is, whether the person inflicting the injury did so with the knowledge that it would cause death, or that it was likely to have that effect; if he acted with that knowledge, the crime, unless specifically exempted, comes under none of the exceptions, and is culpable homicide under Section 300, in other words "murder."

Now, in the present case, the Sessions Judge has gone simply on the want of premeditation, adding, curiously enough, the remark that the deceased gave the prisoners no provocation. It is proved beyond question, by the medical evidence, that the injuries inflicted on the deceased were of a most desperate nature; the bones of the skull were driven into the brain, and the weapons used were heavy bamboo banghy sticks, weighing nearly 5 lbs. a piece. The nature of the injuries shows, conclusively, that the persons inflicting them must have, at the least, known that they were likely to cause death; and all consequences must be presumed against men who beat another's skull into numberless pieces with weapons that might naturally be expected to produce such a result.

The crime, as proved by the evidence, appears to be nothing short of murder under Section 300 of the Penal Code; and as the Judge has convicted of the lesser offence under Section 304 on a mistake of law, I think that the case should be sent back for him to come to a legal finding.

This Court, as a Court of Appeal, cannot enhance any sentence; and, therefore, although I could alter the conviction for culpable homicide not amounting to murder to murder itself, I could not interfere with the sentence, or pass either of the only sentences allowed by law. I think, therefore, that the Judge should be directed to find on the evidence whether the killing was done with the knowledge of likelihood that it would cause death; if he finds it so, and that none of the exceptions apply, he should convict the prisoners of murder, and pass sentence either of death or of transportation for life.

The papers must be laid before another Judge.

Kemp, J.—I quite concur with Mr. Justice Glover, that the evidence is amply sufficient to sustain a conviction of "murder."

The cranium of the deceased was completely smashed, and several pieces of bones were buried in the substance of the brain. The Medical Officer, in answer to a question as to the probable number of blows inflicted, replied: "The whole head was a mass of bruises; it is impossible to say how many blows were given."

It is in evidence that the deceased remonstrated with the three prisoners, because they cut a crop belonging to him. The prisoners, a father and his two sons, then and there, set upon the deceased, and beat

him with heavy sticks in a cruel manner. It may be that the act was not premeditated, and this fact may, doubtless, be taken into consideration in awarding punishment; but the absence of premeditation will not reduce the crime from murder to culpable homicide not amounting to murder.

Culpable homicide is murder, unless it comes under some one of the exceptions laid down in the Penal Code. This case does not come under any of the exceptions. The prisoners, without any provocation, the Sessions Judge admits, used heavy sticks—all the blows were aimed at the head of the deceased, whose skull was literally smashed to pieces; the prisoners must have known that their acts were so imminently dangerous that they must, in all probability, have caused death or such bodily injury as was likely to cause death; they are, therefore, clearly guilty of murder, and nothing short of murder.

As a Court of Revision, I would order a new trial. The prisoners were charged with culpable homicide not amounting to murder, and they have not pleaded to the graver charge. The Sessions Judge must amend the charge under Section 244 of the Code of Criminal Procedure. The trial may be immediately proceeded with, unless the Sessions Judge be of opinion that the accused persons will be prejudiced in their defence by so doing; in that case, the Sessions Judge will proceed under Section 246 of the Code. The accused may be permitted to re-call and examine any witnesses for the prosecution, who may have been examined on the first trial. On the completion of the trial, the Sessions Judge will pass a legal sentence.

Glover, J.—After reading the remarks of Mr. Justice Kemp, I concur in ordering a new trial.

The 10th July 1865.

Present :

The Hon'ble W. S. Seton-Karr, *Judge.*

Prisoner charged with graver offence, but convicted of lesser offence.

Queen versus Satoo Sheikh.

Committed by the Assistant Magistrate of Bongong, and tried by the Officiating Sessions Judge of Nuddea.—Crime charged, culpable homicide amounting to murder.

A Jury may ignore the graver charges on which a prisoner is tried, and find him guilty of a lesser one on the evidence.

THE appeal appears to be out of time. But this is one of those very common cases in which a husband beats his wife, because

his meal is not ready, in such manner as to cause her death by rupture of the spleen.

The Jury, on the evidence which is clearly explained by the Sessions Judge, ignored the graver charges, and found that the prisoner was guilty of grievous hurt; similar findings and convictions have been upheld in very similar cases by the High Court.

There is nothing, as it appears to me, illegal or incorrect in such a finding on the evidence as reported; and certainly there cannot be the slightest ground for any mitigation of the moderate punishment inflicted.

I reject the appeal.

The 11th July 1865.

Present :

The Hon'ble W. S. Seton-Karr and G. Campbell, *Judges.*

Culpable Homicide not amounting to Murder—Affrays respecting land—Right of private defence of property—Unlawful Assembly.

Queen versus Mitto Sing, Ghoghan Sing, Nilkunt Sing, Begum Sing, Nuck Ched Sing, Moorut Sing, Sheho Seehoy Sing, Beda Sing, Kerut Sing, Gheema Sing, and Jhumun Sing.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Patna.

In an affray respecting land one of the aggressive party was killed. The prisoners, who were exercising the right of private defence of property, were acquitted by the Jury of culpable homicide, but convicted of rioting. HELD that the prisoners, not being legally guilty of culpable homicide, were not legally guilty of any other offence coupled with rioting, and, not being rioters, or members of an unlawful assembly, could claim the benefit of Section 104, Penal Code.

Campbell, J.—This case arises out of an affray respecting lands between two parties of armed Rajpoot villagers in a village in Behar.

One of the party opposite to that of the prisoners was killed, and certain persons (Shunkar Sing and others) have already been convicted of culpable homicide, and sentenced to one year's imprisonment; it being the opinion of this Court (by whom the sentence was mitigated) that, under the circumstances of aggression by the other party, the offence was not of a deep dye.

The present appellants, who are of the same party as Shunkar Sing, have been put on their trial in the case now before the Court on charges of culpable homicide and rioting. It does not seem to be suggested that any of them struck the blow which caused deceased's death (which evidence, I think, attributes to some of the persons

Vol. III. before convicted); but the case for the prosecution is that, as the actual perpetrator and the present prisoners were banded together for the commission of the offence, they are liable for the results. The case was tried by Jury. The charge of the Judge shows that he had gone into the case in a thorough and complete way, such as alone can fairly secure the best use of the Jury system. If every case was as thoroughly sifted by Judges, much advantage might be derived from the use of Juries. He has brought out the questions of facts proper to be left to the Jury, and has, in good faith, left them entirely to the Jury in a way which might serve as a model for such cases; and, especially, he has addressed himself of that which I have before observed to be too frequently neglected in affray cases, *viz.*, to find which party was the aggressor, and whether either exercised wholly or to some degree a right of private defence. To ascertain this, and to guide his judgment in regard to the severity of the sentence, he had, before taking the verdict of guilty or not guilty, put some specific questions to the Jury. This practice is, I think, in such a case, worthy of all commendation. It is not expressly provided for in the Code of Criminal Procedure, but there is nothing there inconsistent with such a practice; and, as I have had considerable practical experience of trial by Jury in England (though more in civil than in criminal cases), I may add that the practice of putting specific questions to the Jury is not uncommon there.

In this case, then, the Jury substantially find that the riot was "the result of the deliberate collections of men by both parties;" further, that the scene of the riot was Shunkar's field, and that the opposite parties were the aggressors. (It seems that there had been litigations between the parties about the field, and that Shunkar's right and possession had been legally decided in his favor.) Upon the facts, and the Judge's charge, they acquitted the prisoners of culpable homicide, and convicted them of rioting.

The point urged by the appellant's pleader is that, as the prisoners have been acquitted of the culpable homicide, and the other party are found to be the aggressors on the field of their party, they were not members of any unlawful assembly, but acted in self-defence, and that on this point the Judge mis-directed the Jury. After hearing the pleader for the prisoners, and the Government pleader in reply, I think that this objection can be sustained.

The charge of the Judge was in substance (as regards this point of law) as follows:—
 "If you think that the prisoners' party were the aggressors, then you must find all those who were present banded together for a common unlawful object, and of which homicide was the probable and actual result, guilty of culpable homicide. But if you think that the opposite party were the aggressors, and that the prisoners and others turned out armed and prepared to fight in defence of their property, it cannot be said that the turning out of an armed force of fifty men is a reasonable act in exercise of the right of private defence, and, in that case, you might convict them of the minor charge of riot only." Acting apparently on this last suggestion, the Jury convicted of riot.

Now, the question is not, whether there was a reasonable exercise of the right of private defence, but whether there was a lawful exercise of that right. The law is this (Sections 99 to 104 of the Penal Code), that in certain circumstances (of which the mere defence of property against trespass is not one) the right of private defence extends to causing death; and that, in other cases, the right extends to causing any harm short of death, subject in both cases to the general limitations of Section 99. Now, as in this case there was no right to cause death in defence of the property, the parties who killed the deceased are no doubt guilty of culpable homicide. I also think it may well be that, if several parties band together, and so act in defence of property that the unlawful causing of death is a natural and probable result, and death is, in fact, so caused, it would be very dangerous to hold otherwise than that they are all responsible and guilty of culpable homicide of a low degree though it be. It may, therefore, be that, if the Judge had so charged the Jury, the facts might have been found such as to justify a verdict of guilty of culpable homicide against the prisoners. Those who indulge in such an excessive private defence do so at their own risk. But if no death actually is caused, then the right of private defence has not been exceeded. Are those banded for the defence guilty of any crime? In this case the prisoners have been acquitted of the culpable homicide, which places them in the same position as if there had been no culpable homicide. Can they be convicted of rioting, because there occurred a culpable homicide of which they are not guilty? I think not. In fact, they have not (as the finding stands) exceeded the right of private defence.

But are they guilty of unlawful assembly and rioting as a separate question? See the definition of Unlawful Assembly (Section 141). The object of the assembly must be one of those specified. It must be either to commit some act which would be an offence independent of the assembly (and, as the only offence of this kind was the culpable homicide, the prisoners are found not guilty of assembling with that object), or it must be by criminal force to take or obtain possession of any property, or to enforce any right or supposed right. I think that the latter provision applies to an active enforcement of a right not in possession, and not to the defence of a right in possession. Therefore, I cannot see that the mere assembling in defence of property is an unlawful assembly, unless the persons assembling both intend to commit (or to run extreme risk of committing) and actually do commit culpable homicide. In short, my view is that, when parties in good faith act in defence of property, whether they be many or few, and whether they be all the actual owners, or whether some of them be assembled at the request of the owner in possession of the property, they must be guilty of culpable homicide or of nothing. In this view I would quash the conviction as illegal, and release the prisoners. The case must go before another Judge.

I would add that it has been suggested by the Government Vakeel that the sentence cannot be disturbed without sending for the whole file; whereas, I have before me only the charge to, and finding of, the Jury in which the illegality is alleged to occur. I find no such provision in the Criminal Procedure Code, and the words in Section 419 'after perusing the proceedings of the Sudder Court' do not seem to me to necessitate the perusal of the whole of the evidence, &c., when that is wholly immaterial on a point of law, but only those parts of the proceedings which are material to the question at issue. To send for the remainder of the proceedings would, therefore, be a mere empty form.

Selon-Karr, J.—After consulting with Mr. Justice Campbell, I think it advisable to send for the record in this case. No other order is necessary at present.

Selon-Karr, J.—The papers have now been forwarded, and after hearing the pleader for the appellants, and after calling on the Government pleader to reply, I am clearly of opinion with Mr. Justice Campbell that the legal effect of the Jury's finding on the whole case must be that the prisoners do go free.

To put the case as concisely as possible, Vol. III. the finding of the Jury frees the prisoners from the charge of culpable homicide, and, as a necessary consequence, of rioting attended with culpable homicide. It is true that the Jury found the prisoners guilty of rioting under Section 147. But a comparison of the offence of rioting and of unlawful assembly, as defined in Sections 146 and 141 of the Code, with the other facts found by the Jury, completely cuts away this further ground from the prosecution. For the Jury also find that the opposite party, and not the prisoners, were the aggressors; and that the prisoners were assaulted on their own lands. Clearly, then, their object could never have been one of those contemplated in the 3rd, 4th, and 5th Clauses of Section 151. They were not, the Jury practically find, either going to commit mischief or criminal trespass, or going to deprive any person of any property or right, or going to compel any one by criminal force to do what he ought not to do, or to omit to do what he ought. On the contrary, on the facts found as to the possession and ownership of the field, they were only exercising the right of private defence contemplated in Section 104, without the aggravation which would have deprived them of the benefit of that Section. The effect of the Jury's acquittal on the major charge of culpable homicide is to put the death of Shoo-bal out of the question as far as they are concerned; and if they are not legally guilty of his death, then they are not legally guilty of any other offence which can be coupled with rioting; for none other is even urged against them, and, not being rioters or members of an unlawful assembly, they can thus claim the benefit which was intended by Section 104 for persons who exercise the right of private defence within certain limit. Those limits they are not found to have exceeded.

I do not lose sight of the fact that, by law, an assembly which was, at first, lawful may become subsequently an unlawful assembly (Section 141, Explanation). But the prisoners have been found not to have committed the extra act which would have converted their assembling for such a legal purpose as the defence of their own property into an illegal mob: to wit, either the death of Shoo-bal, or any other extra and unlawful act; and, as to their numbers and any force used by them, such as mere repelling aggressions, the law, on the facts found, would protect them under Section 104.

The prisoners are released.

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The 11th July 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Criminal Breach of Trust.

Queen versus Subdar Meeah, Constable.

Committed by the Assistant Commissioner, and tried by the Deputy Commissioner of Cachar.—Crime charged.—Theft.

A constable, who dishonestly misappropriates to his own use the pay of his Thana Police entrusted to him, is guilty of criminal breach of trust.

Seton-Karr, J.—This case is not so clear as it might have been made in the Deputy Commissioner's decision, though it is quite clear on the evidence.

It appears to me that the facts of this case, as disclosed by the evidence, prove the guilt of the prisoner beyond doubt or question. The prisoner, lawfully entrusted with the pay of the Thana Police, disappeared, for six months, on his way to the thana; and then, on arrest, told an improbable tale of the upsetting of a boat, whereby he only saved twenty rupees out of hundred and one, which twenty rupees he afterwards spent on himself.

The finding on such facts should, it appears to me, have been for criminal breach of trust under Sections 405 and 409, and to this the sentence and finding should be altered—the punishment remaining the same.

Kemp, J.—I quite concur. There was no dishonest taking. The possession of the money by the prisoner was a legal possession. The money was entrusted to the prisoner, and he held it subject to the duty of applying it for the purposes for which it was entrusted to him, viz., the payment of the salaries of the Officers of a Police Out-Station, of which he, the prisoner, was constable. He dishonestly misappropriated the money to his own use, and is, therefore, guilty of criminal breach of trust. The finding and conviction must be altered. The sentence may stand.

The 11th July 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Transportation—Substitution of; for Imprisonment.

Queen versus Tonooram Malee and others.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of theft in a building.

Transportation can only be substituted for imprisonment when the offender is sentenced to at least 7 years' imprisonment in one case.

Kemp, J.—THESE prisoners have been convicted of theft in a building, Section 380.

There were three distinct cases of theft. The prisoners were discovered by the police dividing the spoil. Much suspicious property, in addition to the properties which have been well identified by the three parties who were robbed, was found in the possession of some of the prisoners, and for which they could not honestly account. Of their guilt I entertain no doubt.

The only point requiring remark and revision is the illegality of the sentence of transportation. Under the terms of Section 59 of the Indian Penal Code, imprisonment can be converted into transportation only in a case in which the offender has been sentenced to at least seven years' imprisonment. In the present instance, though some of the prisoners are convicted in all the three cases, and the aggregate sentence in the three cases may be more than seven years, still, as in no one case has a sentence of seven years been passed, the provisions of Section 59 will not apply.

The sentences being illegal, I would annul them, and pass the proper sentence, which is, that the prisoners be rigorously imprisoned for the period fixed by the Sessions Judge instead of being transported.

The papers will be sent to my learned colleague.

Seton-Karr, J.—I concur. Two Judges in the English Department have ruled the same already.

The 12th July 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Defamation.

Queen versus Pursoram Doss.

*Committed by the Joint Magistrate, and
tried by the Sessions Judge of Tirhoot,
on a charge of defamation.*

A person, using defamatory expressions for the protection of his son's interests, is not privileged, unless the imputation is made in good faith, *i. e.*, with due care and attention.

Kemp, J. This is an application to review our judgment, dated 22nd February 1865.*

Mr. Doyné, the learned Counsel for the applicant, contends that, under the English Law, a defendant in a criminal case is not tongue-tied, and that he may make use of any remarks, however defamatory *per se*, with perfect immunity and protection from indictment or action. This may or may not be so; but the present case is governed by the provisions of the Indian Penal Code.

The learned Counsel urges that his client is privileged under Exception 9 of Section 499 of the said Code; and, further, that the circumstances, under which the words attributed to his client were used, rebut the inference of malice, and show that they were made in "good faith," and for the protection of the interests of the party making them.

After due consideration, I adhere to our former judgment. Sitting as a Court of Revision, we must take the words used by the prisoner as found by the Magistrate and Judge. The words spoken by the prisoner were unquestionably defamatory; the imputation they conveyed was intended to harm, and was likely to harm, the reputation of Mr. McIver, the prosecutor, in respect of his calling as an Indigo Planter. Moreover, the words conveying the imputation were not used with "due care and attention," and consequently were not used in "good faith." It has been said in the course of the argument that, because there was some ground for the statement that some previous charge of burning the refuse of the Indigo crop in the time of a former manager, and which charge fell to the ground as unsubstantiated, had been

made, the prisoner had some reasonable ground for using the words that he did, and may, therefore, have believed them to be true.

I am of opinion that this subterfuge will not avail the prisoner. Mr. McIver, the prosecutor in the present case, is well-known to the prisoner: the former was not the manager of the factory when the charge respecting the destruction of the refuse of the Indigo by fire was made, and this fact must surely have been well-known to the prisoner, who resides in the same district, and is a man of some note.

The words used by the prisoner were not necessary for the protection of his interest. The charge against the prisoner was "riot." The *factum* of the riot was established; the prisoner appears to have owed his acquittal to difficulty of identification. Now, any words that he might have used, having a direct reference to, or bearing upon, the charge of "riot," might possibly have been privileged; but the imputation made by him had no connection whatever with the offence with which he was charged; it went far beyond what the occasion required, and, further, it was not made in good faith.

I would reject the application; the conviction and sentence must stand.

Glover, J.—That the words used by the petitioner Pursoram Doss were in themselves defamatory, there can be no manner of doubt, whether we take the evidence of the prosecution-witnesses, or the petitioner's own statement as to the precise form of words employed. For the purposes of this review, we are, I imagine, bound to take the words as found by the Magistrate and Sessions Judge; but, in either case, the effect will be the same, and the only point for consideration will be, whether, under the circumstances, the words were privileged—whether, in short, the petitioner can claim the benefit of Exception 9, Section 499 of the Penal Code.

English Law gives great license to a defendant in the position of Pursoram Doss, and, I suppose, it may at once be conceded that by English Law the petitioner would be privileged.

Exception 9 above quoted recites: "It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interests of the party making it."

Now, there can be no doubt that the Mohunt, in accusing Mr. McIver of bringing false charges against innocent people, did so in the hope of damaging that person's credit

* See Weekly Reporter, Vol. II, p. 36.

Vol. III. *quoad* the charge of riot then being investigated, and, therefore, he acted for the protection of his own interests. The question that remains is, did he so charge Mr. McIver in "good faith."

"Good faith" is defined in Section 52 of the Penal Code as referring to things done or believed with "due care and attention."

Had, then, Pursoram Doss any reasonable ground for believing his charge against Mr. McIver to be true?

No doubt, there had been a charge of burning Indigo refuse, brought by a Manager of the Factory from which Mr. McIver had come, *viz.*, Ilmasnuggur, and that charge had been dismissed; but it is proved, by proceedings filed with the record, that the occurrence took place in the time of a former Manager, and that Mr. McIver had nothing to do with it, and Pursoram Doss, a man of some importance in the neighbourhood, and a landholder, could hardly have been ignorant of the real facts; for in his accusation of Mr. McIver, as admitted by himself, he mentioned, not only the name of the factory from which that person had come, but the names of the ryots said to have been falsely charged by him. In any case, however, it was for him to show that, in making his accusation against Mr. McIver, he acted with due "care and attention," that is to say, had made some enquiry into the circumstances.

That he might have heard the story, coupled with Mr. McIver's name, is possible, though, for the reasons above given, not probable, and also that in a moment of anger at being accused by that gentleman of participation in a riot, and without thinking of, or caring for, the consequences, he proclaimed his belief that Mr. McIver was in the habit of bringing false charges. But there is nothing about "provocation" in the Section of the Penal Code that refers to this case, nor is it anywhere laid down that even a natural sense of indignation at unjust treatment is sufficient to privilege a person using defamatory words, unless the imputation is made with "due care and attention" to serve his own interests. In the present case it cannot, I think, be contended that it was made with any "care or attention" at all; the words were used, probably, as the petitioner's Counsel suggests, in a moment of anger at finding himself the object of what he considered an "unjust accusation."

He must have known the story of the Indigo refuse burning, either of his own knowledge, or from hearsay; if the latter, he

was not justified under the Penal Code in proclaiming his own views of it, or in accepting it as a fact without enquiry; if the former, he must have known that it was not Mr. McIver who brought the charge, but a former manager of the factory.

Taking all the circumstances, therefore, into consideration, I think that the words were not used with due "care and attention," and were, therefore, not privileged. As, however, this is probably the first case of the kind tried under the Penal Code, and as there would appear to be considerable misapprehension regarding the true scope and meaning of Exception 9, Section 499, Penal Code, I have no objection, if my learned colleague concurs, to diminish the punishment inflicted, and, in lieu of that awarded by the Magistrate, to impose a fine of 200 rupees. The prisoner has already undergone nearly a month's imprisonment, and this, with the fine, will be sufficient as an example.

We have the power of mitigating the sentence under Section 45 of the Code of Criminal Procedure.

Kemp, J.—I cannot concur in mitigating the punishment, particularly at this stage of the case. We are reviewing our former judgment on a dry point of law. The sentence is perfectly legal.

The 13th July 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Hindoo Ladies—Attendance of, as Witnesses.

Appeal from an order of the Sessions Judge of Backergunge, dated 15th June 1865, confirming that of the Magistrate, dated the 8th June 1865.

Queen versus Ram Doyal Dass.

The attendance of Hindoo ladies of respectability and secluded habits as witnesses should not be required where no case is actually before the Court.

Kemp, J.—I HAVE very carefully read and considered the papers annexed to this petition. As a general rule, I should hesitate to interfere with the order of a Lower Court, in the matter of summoning a witness, as the question of the propriety of so doing or not so doing is one which may (in any but unexceptional cases) be safely entrusted to the discretion of the local authorities.

In the present case, the lady makes no charge; the petition, which was presented by Ram Doyal Kur, is withdrawn; and it is broadly intimated that it was never presented with his sanction.

The ends of justice do not require the attendance of the lady, who is a female of respectability and secluded habits. To insist upon her attendance in a case in which no distinct charge is made would simply be to disgrace the family. I think this is clearly a case in which the Sessions Judge might have interposed his authority, and prevented an act of great injustice.

The order of the Magistrate, insisting upon the attendance of the lady, is reversed.

Copy of this order to be sent to the Sessions Judge for communication to the Magistrate.

Seton-Karr, J.—I concur. There does not appear to be any case before the Court. If the Magistrate has still any doubts as to the free action of this Hindoo lady, he can surely take means to satisfy himself whether she is or is not a free agent without dragging her into Court, thereby vexing and annoying the family.

The 17th July 1865.

Present :

The Hon'ble G. Loch, F. B. Kemp, and
W. S. Seton-Karr, *Judges.*

**Culpable Homicide not amounting to Murder—
Rioting—Grievous Hurt—Right of private
defence.**

Queen *versus* Tanoo Shikdar, Azgur Shikdar, Munnoo Shikdar, Abbas Fuqueer Soleem, Mosad Mollah Jahir, Bochem Mollah, and Abbas Akoond.

*Committed by the Deputy Magistrate, and
tried by the Sessions Judge of Backergunge, on a charge of murder, &c.*

Dispute between two parties (the Mollahs and Shikdars), in which the Shikdars attacked and killed one of the Mollahs when exercising the right of re-taking their own property; three of the Shikdars being also wounded. The Shikdars were convicted of culpable homicide not amounting to murder and rioting. As to the Mollahs, *Loch, J.*, was of opinion that they were guilty of voluntarily causing grievous hurt; while the majority of the Court held that they were entitled to the protection conferred by Section 101, Penal Code, on those who, while exercising the right of private defence, caused their assailants any harm other than death.

Loch, J.—THIS is a case which, before Vol. III.

the Penal Code was enacted, would have been designated "an affray with homicide."

The two parties, noted in the margin, armed with various weapons, met and had a fight, and one of the first party was killed

by a stab from a *soulfee*, and three of the other party were wounded.

The Judge, trying the first case, corrected the charges on which the prisoners were committed, and held that the proper charges against them were Sections 302, murder; 304, culpable homicide not amounting to murder; 326, voluntarily causing grievous hurt by dangerous weapons; and 148, rioting, armed with deadly weapons.

The Sessions Judge, concurring with the Assessors, found all the prisoners guilty under Section 304, and sentenced them each to seven years' transportation.

Also, in concurrence with the Assessors, he found them guilty under Section 326, and sentenced all the prisoners to seven years' transportation, such sentence to commence, and to be concurrent with the sentence under Section 304.

He, further, in concurrence with the Assessors, found all the prisoners guilty under Section 148, and sentenced them to three years' rigorous imprisonment, such sentence to take effect from the commencement of, and to be concurrent with, the sentence under Section 304.

Two appeals have been preferred from this sentence passed upon them by the Sessions Judges: one by the Shikdars, or *first party*; the other by the Mollahs, or *second party*. The legal objections taken by both are similar. The objections as to the facts found differ.

On the part of the Shikdars it is urged that their allegation has not been properly investigated, nor their witnesses examined at the trial; that the witnesses for the prosecution are strangers, or connected with Mollahs, and, therefore, their evidence is not trustworthy. They allege that the breach of the peace originated in a cow of Azgur's trespassing on the field of Monsoor Mollah, the deceased, and that in revenge he and the others of the second party, armed, attacked their

et. III. houses and plundered their property, and that they acted merely in self-defence; that, during the scuffle, Monsoor received a stab which caused his death, and some of their party were wounded; that, as they acted in self-defence (a fact which could have been proved had the evidence of their witnesses been taken), they cannot be considered to have committed any offence punishable by law; that, even if the evidence for the prosecution be considered creditable, yet even then they cannot be held guilty of the offences of which they have been convicted. Exception is also taken to some of the witnesses as being hostile to defendants.

The Judge finds that there was a sudden fight, and, therefore, the case comes under Exception 4, Section 300, which removes the offence from the class of wilful murder, and brings it under the head of culpable homicide not amounting to murder; and he considers that, under Section 146, Penal Code, all the parties being members of an unlawful assembly, are guilty of the offence committed in prosecution of a common object.

It is contended for the appellants that the prisoners were not members of an unlawful assembly; for, even if their number exceeded five, they were not in pursuit of any common object; that, even if they had a common object, it must be shown that that object was one or other of the five enumerated in Section 141 to make it an unlawful assembly; and, though it be fully admitted that an assembly, not unlawful when assembled, may subsequently become so, yet the Sessions Judge does not find such to be the case in the present instance.

It is further urged that, if the prisoners do not come within the meaning of Section 149, they cannot be convicted of culpable homicide, for it is evident that all did not join in killing Monsoor. The evidence points to one individual. If he be guilty of that offence, they cannot be convicted of the same.

With regard to the conviction under Section 326, it is urged that the Judge has not showed what was the cause of the breach of the peace, nor has he determined by proper evidence the place in which it happened. If, as urged by the appellants, their houses were attacked, they were justified in using weapons in self-defence.

Against the conviction under Section 148, it is urged that, until it be shown that they were members of an unlawful assembly, they cannot be convicted in this Court; and, if the other charges fail, this must also.

On the part of the Mollahs it is urged that they were in the exercise of a legal right when attacked by the body of Shikdars, armed with spears and harpoons; that Moonsoor was endeavoring to secure a cow belonging to Azgur Shikdar, which had trespassed in his rice-field; that Azgur came to rescue it from his hands, and called the other Shikdars to his assistance; that they came armed to the spot, crossing the khal which was the boundary between the two villages; that Monsoor called to his brothers for help, and they ran to his assistance armed with sticks; that a fight occurred, and that Monsoor was stabbed; that the Shikdars were the aggressors, and came armed to prevent the Mollahs doing what they were legally entitled to do. The pleader for the Mollahs also adopts the legal objection raised by the pleader for the other party.

It is necessary first of all to dispose of the objection raised by the pleader for the Shikdars that, out of seventeen witnesses cited by him, only six were examined. I find the names of the seventeen witnesses for the defence of the Shikdars entered in the calendar, of whom seven were examined, and the others were absent at the trial. Their absence at the trial is a sufficient reason why they were not examined, nor do I find that any application was made to the Judge to enforce the attendance of these witnesses, so that this objection is untenable. Of the evidence given by the witnesses on the part of the Shikdars who were examined, it may be safely said that it is unworthy of credit, and quite insufficient, in my opinion, to support the defence set up by the Shikdar prisoners. The Mollah prisoners all plead *alibi*, and of course have found no difficulty in producing witnesses to depose to their respective statements.

I have read the evidence for the prosecution, and see no grounds for discrediting it. Some of the witnesses have perhaps not disclosed all they know as to the origin of the quarrel. Most of them attribute it to the cattle of the Shikdars trespassing in the rice-fields of the Mollahs, but they do not say how they ascertain this to be the case. The only witness who gives clear and credible evidence on this point is Panjoo, Shikdar No. 5. He says he saw Monsoor Mollah and Azgur Shikdar dragging at a cow; Azgur called out, and Tanoo No. 180, Munnoo No. 182, Soleem No. 184, and Akbur Fuqueer No. 183, ran to his assistance armed with spears, &c.; on the side of Monsoor were Zalim No. 186, Bachun No. 187, Imrad

No. 185, Abbas Akhoond No. 188, armed with *lattees*, and both parties fought; Monsoor was wounded by Tanoo; and he adds the Shikdars' cow had eaten Monsoor's rice, hence the fight. And, from the evidence of other prisoners, it is proved that the fight took place on Monsoor's and Bachun's ground, so that it is clear that the Shikdars crossed the khal which separated their village from that on the Mollahs when they went to the assistance of Azgur. The story told by the witness Panjoo Shikdar appears to me to be the truth, and to give the real facts of the case. Other witnesses speak to the fact that Monsoor fell by the hand of Tanoo; and, as the numbers on either side were few, it is by no means impossible that the witnesses were able to see what they have deposed to. It appears to me quite clear, from the evidence of the prosecution, that Monsoor, in attempting to secure the cow which was destroying or trespassing on his crop, was only exercising a legal right; that Azgur, in attempting to rescue the animal from his custody, and the others who came to his assistance, were clearly guilty of an illegal act tending to cause, and which did cause, a serious breach of the peace in which Monsoor received a wound from the hand of Tanoo, which caused his death. But, though the Shikdars committed an illegal act in attempting to rescue the cow from Monsoor's custody, that was no sufficient reason why the Mollahs should go to their assistance armed with clubs, and prepared and intending to commit a breach of the peace. Their intention must be gathered from their acts. They cannot plead Clause 1, Section 97 of the Indian Penal Code, as justifying their conduct, for, though that clause declares the right of private defence to extend to the defence of one's own body, and the body of any other person against any offence affecting the human body, it does not authorize men to rush armed with sticks, and with the intention of committing a breach of the peace, to the assistance of a party who is being resisted in doing an act which he is authorized to do by law. Their presence so armed was calculated rather to cause a breach of the peace than to preserve it; nor does it appear that, when they ran to the spot, any attack had been made on the person of Monsoor. Looking at all the circumstances of the case, it appears to me to be proved that the Shikdars went armed with spears and weapons to the assistance of Azgur Shikdar, who was endeavoring to take a cow which was trespassing from

the lawful custody of Monsoor, deceased; that the Mollahs, summoned by Monsoor, ran to his assistance armed with sticks and clubs; that an affray took place in which Monsoor was stabbed by Tanoo Shikdar and Azgur Shikdar, and Soleem Shikdar received grievous hurt.

The Shikdars are guilty, therefore, under Section 141, Clause 5, *viz.*, that they, being members of an unlawful assembly, compelled Monsoor, by means of criminal force, to omit to do what he was legally entitled to do; Monsoor, in securing the trespassing cow, was doing an act which he was legally entitled to do. The Shikdars, in numbers more than five, assembled with the object of preventing his so doing. Tanoo, one of their number, stabbed Monsoor with a spear, from the effects of which wound Monsoor died. Tanoo is guilty, therefore, of culpable homicide not amounting to murder, under Section 304, Indian Penal Code, and the others of his party are guilty of aiding and abetting him in that act, and are also guilty under Section 149 of the Code, as the homicide was not committed in prosecution of the common object; they are guilty also of rioting under Section 148.

On the other side, Mosad, No. 185, is guilty of the offence described in Section 326 of the Indian Penal Code, *viz.*, the voluntarily causing grievous hurt by means of an instrument, which, used as a weapon of offence, is likely to cause death, and the other Mollahs of aiding and abetting him. They have also committed an offence under Section 141, Clause 4, inasmuch as, when members of an unlawful assembly, they, by criminal force, endeavored to obtain possession of property, and to enforce a right, and, therefore, the provisions of Section 149 are applicable to the whole of them for any act done by one of their number. The records of two supplementary trials have also

Prisoner Monabodee. been sent up to the Court: one in which Monabodee has been convicted by the Sessions Judge of wilful murder, and sentenced to transportation for life.

The second, in which Zahir Mollah and Zaheer Mollah have Prisoner Zahir Mollah. been convicted of culpable homicide not amounting to murder under Section 304, and Prisoner Zaheer Mollah. been convicted of culpable homicide not amounting to murder under Section 304, and of riot under Section 148, and sentenced to seven years' transportation.

The finding in these two trials is inconsistent. The judgment in the case of Monabodee appears to have been passed in conse-

Vol. III. quence of some remarks made by the High Court in the Criminal Statements of Zillah Backergunge for the month of January 1863, in which a report of the first trial was entered, and from the terms of that report it appeared that the conviction should have been for murder, and not culpable homicide not amounting to murder. On first reading the judgment, I was of the same opinion, and it was not till I looked into the evidence that I considered the Judge to be correct in holding that the prisoners were guilty of the lower crime of culpable homicide. Monabodee is one of the party of the Shikdars, and cannot be convicted of a higher offence than that of which the others were found guilty. I convict him of aiding and abetting in the culpable homicide of Monsoor under Section 304, Penal Code, and under Section 149, he being a member of an unlawful assembly, and committing the offence described in Section 141, Clause 5. I also find him guilty under Section 148.

The Judge has acquitted Zahir Mollah and Zaheer Mollah of the charge under Section 326, *viz.*, that of causing grievous hurt by the use of dangerous weapons, and convicts them under Section 304 of culpable homicide not amounting to murder, an offence of which they are not guilty; and of rioting under Section 148 of the Penal Code. Now, it is clear that these persons were members of an unlawful assembly, having a common object, the enforcement of a right by criminal violence. In furtherance of this object, they used criminal force, and wounded some of the other party, but did not kill any one; so that they cannot be said, under Section 149, Penal Code, to have been guilty of culpable homicide not amounting to murder, but are really guilty of the offence of causing grievous hurt, under Section 326, by means of instruments which, used as weapons of offence, were likely to cause death. They are also guilty of rioting under Section 148.

Looking, therefore, to the evidence in the case, I convict the prisoner Tanoo Shikdar, under Section 304, Penal Code, of culpable homicide not amounting to murder, and confirm the sentence of seven years' transportation. I convict the prisoners Azgur, Munnoo Abbass, Fukeer Soleem, and Monabodee, of aiding and abetting culpable homicide not amounting to murder, and sentence them to seven years' transportation. I convict all the above prisoners under Section 141, Clause 5, as having, whilst members of an unlawful assembly, used criminal force to compel Monsoor not to do what he was

legally entitled to do, and, while so acting, of having committed culpable homicide not amounting to murder, of which all are guilty under Section 149, it having been committed in furtherance of their common illegal object. I also convict them all of rioting under Section 148; but, on those two last charges of which the prisoners are proved guilty, I add no further sentence.

I convict the prisoners Mosad Mollah, Jalin, Bochin Mollah, Abbass Akhoond, Zahir Mollah, and Zaheer Mollah, under Section 141, Clause 4, of having, while members of an unlawful assembly, attempted by criminal force to take possession of property, and to enforce a right, and, while so doing, to have been guilty, under Section 326, of having caused grievous hurt, of which offence all the prisoners must, under Section 149, be held equally guilty.

I convict them also of rioting under Section 148; but, as they were not the aggressors, I would reduce their sentence to five years' rigorous imprisonment, and, therefore, send the case for the opinion of another Judge.

As the Judge has sentenced Monabodee to transportation for life, his case must also go before a second Judge, in order that his sentence may be reduced to seven years' rigorous imprisonment commutable to transportation.

I draw the attention of the Sessions Judge to the Circular Order of 20th August 1864, No. 16.

Kemp, J.—This case has been referred to me by my learned colleague. It is a Backergunge case. It appears that there are two parties concerned, whom, for facility of reference, I shall designate the "Shikdar" party and the "Mollah" party. These parties live in separate but neighbouring villages, a stream of water dividing the two villages.

It is in evidence (*see* more particularly the evidence of the witness Poojoo, whose testimony my learned colleague considers to be trustworthy and independent) that a cow or cows belonging to the prisoner Azgur Shikdar, the brother of Tanoo, the head of the Shikdar party, trespassed upon the field, and destroyed the crops of the deceased Monsoor Mollah. Monsoor Mollah seized one of the cows, apparently intending to take it to the pound. Azgur resisted *this legal act*, and a struggle took place between Azgur and Monsoor, the former trying to rescue the cow, the latter to prevent him. Azgur shouted out to his party, who crossed

the *khal* armed with spears and other sharp pointed instruments. Monsoor, the deceased, then invoked the aid of his brother and neighbours. They turned out armed with sticks; a fight took place, and, in the *melee*, Monsoor was speared through the heart by Tanoo Shikdar, and died from the effects of the injury received about 7 or 8 hours after the occurrence of the crime. On the side of the Shikdars, the prisoners Tanoo, Azgur, and Soleem were wounded. Tanoo's wounds are described by the Civil Surgeon as two in number, slight wounds, and probably inflicted with a stick. Azgur's wound, one in number, is described as severe, inflicted with a stick. The wounds of Soleem are described as three penetrating wounds, small but deep, inflicted most probably with some sharp weapon with two prongs.

The Sessions Judge, Mr. W. T. Tucker, finds that the fight was a sudden one, and not premeditated; that all the prisoners took a part more or less active in the offence which, in his opinion, does not amount to murder, but to culpable homicide not amounting to murder. He, therefore, convicts all the prisoners: *first*, of culpable homicide not amounting to murder; *second*, causing grievous hurt; *third*, rioting, armed with deadly weapons; and sentences all the prisoners to seven years in transportation for the first named offence, seven years in transportation for the second, and three years' rigorous imprisonment for the third.

Both parties appeal. The Shikdar party, while they admit that the cow of Azgur, one of their party, trespassed on the crop of the deceased, aver that the deceased and his partizans attacked their houses, and plundered them, and that they acted in defence of their property, and are justified. The Mollah party urge that they were exercising a legal right when they were attacked by the Shikdar party armed with spears and other dangerous weapons; that, on being called upon by the deceased, their relation, to assist him in his strait, they did so, and that in so doing they were justified under the law.

My learned colleague, Mr. Justice Loch, admits that the scene of the fight was the field of the deceased, and that the Shikdars crossed the *khal*, and so far were the aggressors. But he cannot absolve the Mollah party from responsibility, inasmuch as, in his opinion, there was no good and sufficient reason why the Mollah party should have gone to the assistance of the deceased. That, by doing so, and judging them by their own acts, it must be inferred that they went

prepared and intending to commit a breach of the peace; that they cannot avail themselves of the plea of the right of private defence of their own bodies or property, or the body or property of another against any offence affecting the human body or property.

The learned Judge convicts Tanoo Shikdar of culpable homicide not amounting to murder, and sentences him to seven years in transportation.

The other prisoners connected with the Shikdar party he convicted of abetting the offence of culpable homicide not amounting to murder, and sentences them to seven years in transportation. As to the other party, the Mollah party, the learned Judge convicts Moosad Mollah of voluntarily causing grievous hurt (Section 326 of the Indian Penal Code), and sentences him, in mitigation of the sentence passed by the Sessions Judge, to five years' rigorous imprisonment. The remaining prisoners on the side of the Mollahs he convicts of aiding and abetting the above offence, as also committing an offence as described in Explanation fourth (Section 141 of the Indian Penal Code)—sentence five years' rigorous imprisonment.

I regret that I cannot take the same view of the case as that taken by my learned colleague. It appears to me that the Shikdars were clearly the aggressors. Monsoor Mollah was acting perfectly legally in attempting to carry the trespassing cow to the pound, and Azgur was clearly acting illegally in attempting to rescue it by force. The Shikdars thrust themselves into the quarrel. They crossed a *khal*, armed with very dangerous weapons, with the determination to assist and abet their partizan Azgur in his illegal act. Monsoor, seeing the imminent danger he was in, and exercising the right of defending his own body and the property which had come into his custody in a perfectly legal manner, invoked the aid of his relations and neighbours; and here, I may observe, that the prisoners Mosad and Bochun are brothers, as are also Johur and Abbas: in fact, they are the relations of the deceased. They saw him in imminent danger, and they went to his aid, and struck a few blows in his defence. In doing this, under the circumstances above detailed, I hold them to have exercised a legal right of defending their relation, the deceased Monsoor Mollah, against an offence imminently threatening his body and the property which was legally in his custody. There was no time for the deceased to have recourse to the public authorities. His person and his legal rights

Vol. III. were threatened, and the danger was imminent. He called upon those who he thought would protect him, and they, instead of standing aloof, responded to the call. The Mollah party do not appear to have inflicted more harm than was necessary in defending themselves. They were armed with sticks only, and the injuries inflicted upon the opposite party were not very severe. Whereas the opposite party deliberately crossed the boundary stream, were armed with spears and other dangerous weapons, and one of them pierced the deceased through the heart, and killed him.

I would acquit the Mollah party, consisting of the prisoners named in the margin.*

- * 1. Mosad Mollah.
- 2. Jalin.
- 3. Lochun Mollah.
- 4. Abbas.
- 5. Zuheer Mollah.
- 6. Zahir Mollah.

If the conviction is held to be good by another Judge, I certainly think the punishment proposed by my learn-

ed colleague, taking into consideration the sentence he proposes for the party whom he admits to be the aggressors, is too severe; and in this view I would ask him to re-consider the sentence which he proposes to pass on the Mollah party. I concur in reducing the sentence of Monabodee on the side of the Shikdars, as proposed by my learned colleague. Monabodee is guilty of the same offence as the other members of the Shikdar party; and, as he did not take a more active part in that offence than the other prisoners, I see no reason to make any distinction in the punishment awarded.

The papers must be laid before another Judge.

Seton-Karr, J.—The trial, as regards the Shikdars, has been finally decided; but this case has been referred to me as regards the party which, for the sake of perspicuity, may be termed the Mollah party. Both my learned colleagues agree as to the facts of

this case, as to the cause and scene of the dispute, and as to the manner in which the various injuries sustained by both parties were inflicted.

As regards the legal points raised in favor of the Mollahs, I concur in the conclusions arrived at by my learned colleague, Mr. Justice Kemp. The Shikdars were all along the aggressors. The cow of the Shikdar trespassed on the field of Monsoor Mollah. He, Monsoor, captured the animal, as he had a right to do, and was about to take him to the pound. The Shikdars crossed the *khal*, armed with lethal weapons, attacked Monsoor, and one of them killed him by the thrust of a spear. Before this last event happened, the relations of the deceased Monsoor came up, and endeavored to assist him in the retention of that which had lawfully come into his hands, and in defence of which he and those who came to his assistance were only exercising a legal right. They inflicted no hurt on the party of the Shikdars, which could not be justified under some portion or other of the Sections of the Penal Code, 96 to 101 inclusive. They certainly wounded three of the attacking party; but that party had attacked their relation when exercising a right of legal capture on their own property, and finally caused his death. There was no time to apply to the proper authorities, and, if in repelling the murderous and illegal attack, and resisting the re-capture of the cow, the Mollahs did use force, and did ply their sticks, they may be fairly said to have inflicted "no more harm than was necessary for the purpose of defence" (Sec. 99, Cl. 4), and they are certainly entitled to the protection which Section 131 confers on those who, while exercising the right of private defence, cause their assailants "any harm other than death."

The whole of the Mollah party must be released.

The 18th July 1865.

*Present :*The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.***Disputed possession of land—Jurisdiction.**Queen *versus* Juggobundoo Sircar and John Stevenson.

A Magistrate may direct a Deputy Magistrate, vested with the full powers of a Magistrate, to pass proper orders in a case of disputed possession of land decided by him under Section 318, Code of Criminal Procedure, but he cannot withdraw the case from the file of the Deputy Magistrate, and, instituting a fresh case, dispose of it himself.

WE concur with the Sessions Judge that the Magistrate was wrong in supposing that he was legally justified in instituting a fresh case to decide the question of possession under Section 318 of the Code of Criminal Procedure, which had already been disposed of by an officer of equal powers with himself. It appears that the Deputy Magistrate, who is vested with the full powers of a Magistrate, under Section 318 of the Code of Criminal Procedure, gave possession to the first party. In executing the order it was found difficult to lay down the proper boundary line. An attempt was made by the Deputy Magistrate, but his proceedings were objected to by both parties. The Deputy Magistrate, instead of disposing of the question, ordered the papers to be filed in the Sherishta; by this step he left both parties dissatisfied, and the quarrel just as it stood before his interference.

The Magistrate, instead of directing the Deputy Magistrate to pass proper orders in the case, and without, as far as we can see, withdrawing the case from the file of the Deputy Magistrate, under Section 36 of the Code of Criminal Procedure, proceeded to pass orders. In this, we think, he acted beyond his competency. The papers will be returned to the Sessions Judge, who will direct the Deputy Magistrate to take up the case, and decide the boundary dispute between the parties, which he has not hitherto done.

The 24th July 1865.

*Present :*The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.***Arrest under Civil Process of Judgment-debtors cited as Witnesses—Contempt of Court—Protection.**

Referred under Section 434, Act XXV. of 1861, and Circular Order, dated the 15th July 1863.

Thakoordoss Nundee *versus* Shunkur Roy and another.

The arrest under Civil Process of a Judgment-debtor going to a Court in obedience to a citation to give evidence, and made within the precincts of that Court, and with some show of violence and contempt of Court, does not entitle the officers making the arrest to protection under Section 78, Penal Code.

WE have read the reference made by the Sessions Judge, and the explanation submitted by the Deputy Magistrate, Mr. W. H. Ryland.

We are of opinion that the Deputy Magistrate's proceedings are strictly legal. The peons were acting entirely beyond their jurisdiction, and are not entitled to claim protection under Section 78 of the Indian Penal Code.

The judgment-debtor, Thakoordoss Nundee, had been cited as a witness before the Deputy Collector; he was on his way to the Court of that Officer when he was arrested by the two peadahs under a civil process. The peadahs made this arrest within the precincts of the Deputy Magistrate's Court, and with some show of violence and contempt of Court. The peadahs were informed by the judgment-debtor, as well as by the officers of the Deputy Collector's Court, that the judgment-debtor was entitled to protection from arrest under civil process. The protection is "*cundo, morundo, et redundo*," and a reasonable indulgence must be given in construing what is to be held as going, staying, and returning. In this case the witness was clearly going to the Court of the Deputy Collector in obedience to a citation to give evidence, and he was protected from all arrest, which, in this instance, appears to have been made in the sight of the Deputy Magistrate, and in contempt of that officer's authority. The papers are returned.

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The 25th July 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Unlawful Assembly—House Trespass—
Mischief.**

Queen versus Suroop Napit and others.

Committed by the Magistrate of Furreedpore, and tried by the Sessions Judge of Dacca.

House trespass and mischief not being separate offences, but being included in the graver offence of being members of an unlawful assembly armed with deadly weapons, no separate convictions and sentences were deemed to be requisite.

Kemp, J. SUROOP NAPIT was committed by the Magistrate of Furreedpore under three Sections of the Indian Penal Code, *viz.*, Sections 144, 448, and 427. The sentence passed was : two years for the first offence, one year for the second, and one year for the third : total four years.

The other prisoners were convicted under the same Sections, and were sentenced to one year for the first-named offence, six months for the second, and six months for the third. These sentences were upheld on appeal by the Sessions Judge. This Court, acting as a Court of revision, called for the record to satisfy itself of the legality of the sentence passed.

It is clear that the prisoners were guilty of being members of an illegal assemblage, armed with deadly weapons, and they have been properly committed and sentenced under Section 144. But the offences of house-trespass and mischief were not separate offences, but were the fruits and consequence of the illegal assemblage. Separate convictions and sentences were not called for, and the order of the Magistrate must, to this extent, be quashed. The sentences passed for the graver offence, in which the minor offences are included, will stand.

The papers must be laid before my learned colleague, Mr. Justice Seton-Karr.

Seton-Karr, J.—I concur. The respective sentences under Section 144 will alone stand good.

The 25th July 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Riot—Zemindar not liable for Sudden.

Queen versus Hurnath Roy.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of neglecting to use lawful means to prevent riot, under Section 155, Indian Penal Code.

A zemindar ought not to be made liable, under Section 155, Penal Code, for a sudden and unpremeditated riot which there was no reason to infer he could have anticipated, or thought likely to happen.

Seton-Karr, J.—In this case the Sessions Judge has taken a substantially correct view of the dispute between the parties in the riot, attended with the death of Meeroolla, as far as the conduct of the rioters is concerned. His orders on the conduct of the persons actually engaged in the riot have been upheld in appeal.

But the point in this appeal is, whether the zemindar appellant, Hurnath Roy, can be held responsible, under Section 155 of the Penal Code (liability of a person for whose benefit a riot is committed), and liable to a fine of 3,000 rupees ?

I lay no stress whatever on the distance at which the zemindar was residing from the scene of affray : his residence being in Cossipore, Calcutta, and the scene of the riot being in the District of Backergunge. A zemindar, by leaving his estates and residing at the Presidency, cannot avoid his duties and liabilities ; and it is his business to appoint fit and proper persons to manage his local affairs, and to enable him to perform the duties imposed on him by the Legislature. Moreover, it is the zemindar's duty to be regularly acquainted with what goes on in his zemindary. Neither, again, am I prepared to accept a general argument, that the interest of the zemindar is to be measured or computed by the extent of the land in dispute, and that, if the plot be of small extent, he cannot be supposed to be benefited by its retention. It may happen, I hold, that the possession of one beegah, the extent in dispute in the present instance, may be of the utmost consequence to two rival zemindars.

lars, and that either or both would strain every nerve in order to retain possession of the same.

On the other hand, I admit that the small extent of the land and the value of the crop, a crop of hemp, are facts which, in this particular instance, looking to all the circumstances, are *prima facie* in the zemindar's favor.

But the whole case turns on this, *viz.*, fully admitting the duty which the law imposes on the zemindar, and the obligation of the Court to administer law with such good and wholesome severity as shall prevent the discredit to the administration arising out of violent and premeditated affrays, was the riot in this instance committed for the zemindar's benefit or on his behalf? Further, did he, having reason to believe that such a riot was likely to be committed, use all the means in his power to prevent it from taking place, and to suppress or disperse the same? (Section 155.)

Now, after hearing all the arguments of the learned Counsel for the appellant, and of the Government pleader in reply, and after referring to evidence, I find that the riot was most certainly *unpremeditated*. One of the witnesses for the prosecution distinctly says that the fight was "got up suddenly and without premeditation." Another man (Ahladee) also, says, in reply to a particular question put to him, that he did not hear of any anticipation of a riot. The reference to arbitration, of which something has been said by the Judge, is also in favor of this view. Had there been some complaint in the Court, and had the matter in dispute been long left pending and undecided, while angry passions were excited, the zemindar, it might be said, ought to have surmised that an affray was possible or probable. But, if he knew nothing at all, or if he only knew that a dispute between his ryot and the ryot of another zemindar about a crop grown on one beegah of land had been referred to arbitration, there was really no reason why he should apprehend an affray, or why he should think of using means to suppress what was not apprehended. Arbitration is suggestive of an arrangement by peaceable means, and not by violence.

It is true that the Judge finds that some of the appellant's retainers took part in the riot, at which event it is stated that there were some 20 to 40 men on both sides; that none of these retainers appear to have been hired latials, or brought from a distance. They were residents of the locality, and some

of them, as employed in the lawful collection of the zemindar's rent, may, no doubt, be correctly termed retainers; but, if they went out suddenly of their own accord to help one of their own party to retain a crop to which they perhaps thought him entitled, and if they committed acts of violence by which one man was killed, it would not follow that the zemindar knew of or could, by any means, have prevented the affray.

On the whole, I am of opinion that the appellant cannot fairly be brought within the purview of Section 155. The dispute was about a small piece of land, and the cause of the dispute was the attempt to cut the crop. Not only is it probable that this attempt gave rise to a sudden dispute, but the witnesses for the prosecution pointedly speak of the occurrence as sudden and without premeditation. There is no reasonable or just ground, such as might be inferred without direct evidence, had the circumstances been different, that the zemindar ought to have known that an affray was impending, or was even probable; and, consequently, there is no good ground for punishing him, because, in the language of the latter part of the Section quoted, he did not use all lawful means in his power to prevent unlawful assembly or riot from taking place.

In this view I would remit the fine.

The papers must go to Mr. Justice Kemp. *Kemp, J.* After hearing the learned Counsel for the appellant, I entirely concur in the view taken by Mr. Justice Seton-Karr.

The fine must be remitted.

The 26th July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Grievous Hurt on grave and sudden provocation.

Queen versus Chullundee Poramanick.

Committed by the Officiating Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of murder.

A person who, by a single blow with a deadly weapon, kills another—entering at dead of night into a dark room where he and his wife were sleeping separately, for the purpose of having criminal intercourse with her—held guilty of causing grievous hurt on a grave and sudden provocation.

Kemp, J.—This is a case in which I have come to the opinion expressed by me after considerable doubt. As the case must go

Vol. III. before my learned colleague. I would ask him to give it his careful consideration.

The notice of the offence was not given to the police until eight days after the occurrence of the crime—this is an important fact. The body of the deceased Bodhi Sircar was not subjected to a *post-mortem* examination by a medical officer. The body was exhumed on the eighth day after its burial; and, as might be expected, it then being the hot season (April), it was found in such an advanced stage of decomposition that no examination could take place.

There is nothing to implicate the prisoner Chullundee beyond the admissions made by him before the Magistrate. These admissions must be taken in their entirety, and are, to a certain extent, corroborated by the evidence of the witness Hossein, the son of the prisoner. The admissions amount to this, that the deceased was a man of influence in the village; entered the house of the prisoner at a late hour of the night for the purpose of having criminal intercourse with the wife of the prisoner; that the prisoner, to set his mark, for thus he describes it, upon the person of the intruder, threw a weapon, in this case a *dao*, at the deceased; that the deceased was killed on the spot; that the prisoner, assisted by his son, the witness Hossein, carried the body of the deceased out of their house, and threw it down near the house of the deceased, where it was found by the brother of the deceased, the witness Huddun, and others.

It appears that the principal men of the village took counsel together, and the result of their deliberations was, that it was agreed that the crime must be hushed up. The body of the deceased was buried, and his brother, the witness Huddun, was placed under strict surveillance for eight days, when he was allowed his liberty: notice was then given to the police, and enquiry was set on foot.

The prisoner Chullundee pleaded "not guilty" in the Sessions Court. In his petition of appeal to this Court he asserts that he is innocent; that the deceased died of cholera, and that his confession before the Magistrate was not a voluntary one, but was the result of the undue influence and bad treatment of the police.

The other prisoners, the heads of the village, who have been convicted, under Section 301 of the Indian Penal Code, of causing evidence to disappear, knowing or having reason to believe that an offence had been committed, have not appealed.

I have, therefore, to deal with the case of the prisoner Chullundee.

The Judge is unable to believe the admissions of the prisoner to their full extent.

He is of opinion that the prisoner must have struck the deceased when the lethal weapon was in hand, and he wholly discredits that part of the prisoner's admission which describes the manner in which the weapon was used, and the blow inflicted.

The Sessions Judge convicts the prisoner Chullundee of culpable homicide not amounting to murder, giving him the benefit of the grave and sudden provocation which he received at the hands of the deceased. The sentence passed on the prisoner is ten years' transportation.

There is no reliable evidence as to the cause of death; the body, as I have already observed, was not subjected to any *post-mortem* examination by a competent officer. The statement of the police officer and others who were present when the body was disinterred, as to the appearance and character of the wounds on the head of the deceased, must be received with the utmost caution, seeing that this evidence cannot but be based upon their observations of the appearance of the body after it had been admitted eight days in the earth, without any protection from decomposition and decay.

Taking, therefore, the admissions of the prisoner, which I assume to have been voluntarily made, corroborated as they are to some extent by the evidence of his son, the witness Hossein, I find that the deceased in the dead of the night, probably according to previous assignation, but of this there is no evidence, entered the house and room in which the prisoner and his wife were sleeping separately, the room being dark; that the deceased, in pursuance of his guilty purpose, placed his hands on the person of the prisoner's wife; that the prisoner, irritated at this outrage, threw the weapon at the deceased, who fell down, and then and there died. The prisoner, assisted by his son whom he called to his aid, then removed the body of the deceased from their house, and threw it down near the house of the deceased.

Taking into consideration the very grave and sudden provocation which the prisoner received, and the absence of the intention to kill, or knowledge that the act was likely to cause death—facts which I am bound to assume from the admissions of the prisoner, taken as a whole, and not construed as the Judge has done to suit his view of the offence and the prisoner's actions and inten-

tions—I convict the prisoner Chullundee of “causing grievous hurt on grave and sudden provocation.”—Section 335, Indian Penal Code. This is certainly not a case in which a severe punishment is necessary. I sentence the prisoner to one year's rigorous imprisonment, the term of his imprisonment to commence from the date of his original sentence.

The papers must be laid before Mr. Justice Seton-Karr.

The attention of the Sessions Judge is directed to Section 362 of the Code of Criminal Procedure: “The charge should be read and explained to each accused person,” and the plea of each accused person should be separately recorded, and not in the lump, as has been done in the present instance.

Seton-Karr, J.—The sentence of 10 years' transportation, considering the grave provocation, is quite preposterous. We may not be quite certain as to the exact mode in which the blow was inflicted, but the deceased was evidently killed by one blow just as he was about to dishonor the prisoner. I concur in the sentence of the year's rigorous imprisonment proposed by Mr. Justice Kemp for the appellant, Chullundee Poramanick.

The 26th July 1865.

Present:

The Hon'ble C. B. Trevor and F. B. Kemp, Judges.

Insane Prisoners—Procedure.

Queen versus Kalai Sheikh.

Committed by the Deputy Magistrate, Baisirhaut, and tried by the Sessions Judge, Jessore, on a charge of false evidence.

A prisoner who is insane and unaccountable for his actions, and therefore incapable of making his defence, instead of being tried, should be dealt with according to Sections 389 and 390, Criminal Procedure Code.

Trevor, J.—The Civil Surgeon deposes distinctly to the fact that the prisoner is of unsound mind, and not accountable for his actions. He is clearly, therefore, incapable of making his defence; and the Sessions Judge, instead of trying him in this mental state, should have proceeded under the provisions of Sections 389 and 390 of the Code of Criminal Procedure. The trial must be quashed, and he should be directed to act in accordance with the above cited provisions of the law.

Place this before another Judge.

Kemp, J.—I entirely concur.

The 31st July 1865.

Present:

The Hon'ble F. B. Kemp, Judge.

Appeal—Bail—Suspension of Sentence.

Miscellaneous Case.

Queen versus Moorali Kinkur Mookerjee.

Appeal against the order of the Magistrate of Beerbhoom.

Although a Sessions Judge cannot release a prisoner on bail, pending an appeal, he may suspend the sentence pending the appeal.

The offence with which the prisoner has been convicted is not a bailable offence. I therefore think that the Sessions Judge was right in holding that he was not competent to release the prisoner on bail, pending the result of the appeal to his Court.

The Sessions Judge was, however, wrong in holding that he had no discretion to suspend the sentence. This power he clearly possesses under Section 421 of the Code of Criminal Procedure. The Sessions Judge will therefore be informed that, if he see reason to suspend the sentence pending the appeal, he is at liberty to do so, the prisoner remaining in the hajat instead of in rigorous imprisonment.

The 31st July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, Judges.

District Municipal Act—Nuisance—Liability to punishment for.

Queen versus Parbutty Churn Sircar.

Referred under Section 434, Act XXI, of 1861, and Circular Order No. 18, dated the 15th July 1863.

A is punishable if his land is made filthy by nuisances committed by other persons. But, if A has sublet his lands to others, the actual occupiers of the land are liable.

The case is, in some respects, similar to that which formed the subject of the Sessions Judge's letter of the 12th of June, No. 170, the orders in which were communicated in the Resolution of the Court of the 21st of June.

We do not concur in the doctrine laid down by the Sessions Judge in the present reference, to the effect that “a person is not punishable if his land is made filthy by nuisances committed by other persons.”

Vol. III. But in this case the real point has not been enquired into. The accused pleads, not that his land, while still in his own possession and under his control, has been made filthy by other persons, but that he has actually sublet his lands to ryots. This allegation should be enquired into, and, if it be proved, it would seem that the actual occupier of the land would be liable to fine under Section 67 of the Act quoted by the Judge.

We observe, too, that it would be sufficient, under Section 215 of the Code of Criminal Procedure, if the substance of the complaint was stated to the accused on his appearance. After this has been done, and the evidence has been heard, a brief but legal and formal finding should be recorded by the Magistrate.

We annul the sentence of the Joint Magistrate, and direct that the case be re-tried with reference to our remarks.

The 31st July 1865.

Present :

The Hon'ble F. B. Kemp, *Judge*.

Jury (Province of).

Queen versus Rookni Kant Mozoomdar.

Committed by the Judge of the Small Cause Court, and tried by the Sessions Judge of Moorshedabad, on a charge of false evidence.

It is in the province of a Jury to weigh the evidence as to the truth or falsity of the evidence, and to judge of the intention.

This is a trial by Jury - no point of law arises. The prisoner has been convicted under Section 193 of the Penal Code, as well as under Section 199; under the former Section it is not necessary to prove that the evidence was false on a material point. There can be no question that the evidence was false, inasmuch as the assertion, that the employer of the prisoner was at Benares at the time the suit was filed on his verification, was false. The evidence was given in a judicial proceeding, and the intention was corrupt, to wit, to evade Sections 27 and 28, Act VIII. of 1859. Under Section 28, Act VIII. of 1859, the Court must be satisfied that, owing to absence, or some other good cause, the plaintiff is precluded from verifying the plaint. In this case the prisoner, styling himself general attorney of the plaintiff, a woman, avers that she is at Benares, and further verifies the truth of the contents

of the plaint. When examined, he deposes that his employer was at Benares, and this has been found by the Jury to be an intentionally false statement.

It was in the province of the Jury to weigh the evidence as to the truth or falsity of the evidence, and to judge of the intention.

This Court, therefore, cannot interfere; the appeal is rejected.

The 7th August 1865.

Present :

The Hon'ble F. B. Kemp and G. Campbell, *Judges*.

Trial by Jury—Prisoner claiming right of reference to Sudder Court, entitled to opinion of Judge and to appeal.

Queen versus Chukkun alias Juggun Gowalah.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Patna, on a charge of murder.

A prisoner, by claiming the "right of reference to the Sudder Court," does not lose all right to the opinion of the Judge, and to appeal on the facts upon a trial by Jury.

Campbell, J. This is a case of murder and theft, or "theft with murder," committed prior to 1st January 1862. I think that the Sessions Judge has somewhat mistaken the law now applicable to such cases. He is right in trying the case under the new Criminal Procedure. But I hardly think that the general remark, that "the prisoner has not claimed the right of reference to the Sudder Court," can be safely considered to deprive him of all right to the opinion of the Judge, and to appeal on the facts upon a trial by Jury. The facts must, I think, be considered open to revision, if the prisoner should appeal. We ought, therefore, to have on record the opinion of the Sessions Judge, whose opinion for or against the prisoner is in this case material. As important it is that the Sessions Judge seems to consider himself tied down by the provisions of Section 302 of the Penal Code. He appears in that view to have passed the sentence of transportation for life, and to refer the case with a view to its mitigation. I think it is not as the Sessions Judge supposes. The substantive Criminal Law, *i. e.*, the Penal Code, has no application to offences committed before it came into operation. The Sessions Judge has jurisdiction under the

new Procedure, and can, I think, pass any sentence (short of death) to which the prisoner is liable under the old law, subject to reference, if claimed, and to appeal under any circumstances. I have not seen the papers of the former trial, and it does not, on the face of these proceedings, appear why the sentence for such an offence should be reduced below transportation for life. At present I do not see the reason for such a course, supposing the prisoner to be guilty as found, for I have not gone into the evidence.

On the whole, I think, the best way will be to return the case to the Sessions Judge to record a judgment, and (if he convicts) to pass a sentence, leaving prisoner (if he does not claim a reference) a right to appeal on the law and facts, the verdict of the jury *non obstante*.

Let, however, another Judge see the papers before they are returned.

Kemp, J. - I concur. The course proposed by my learned colleague is much the same as that adopted by the learned Chief Justice and myself on a former occasion when the case was before us.

The 7th August 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, Judges.

**Attempt to fabricate false evidence—
Punishment for.**

Queen versus Soondur Putnaick and Neemoon Pootoo.

*Committed by the Assistant Magistrate of
Nugwan, and tried by the Sessions Judge
of Midnapore, on a charge of fabricat-
ing false evidence.*

The term of imprisonment for attempting to fabricate false evidence for the purpose of being used in a stage of judicial proceeding cannot extend beyond one-half of 7 years.

Kemp, J.—THE prisoners have been convicted of the offence of attempting to fabricate

false evidence for the purpose of being used in a stage of a judicial proceeding, punishable under Sections 193 and 511 of the Indian Penal Code. The sentence passed on each prisoner is five years' rigorous imprisonment, and to pay a fine of 20 rupees each, in default to suffer two months' further rigorous imprisonment.

It appears from the evidence that the prisoners gave information to the witness Ekana Allee, who is a Police Inspector, vested in that capacity with the power to hold preliminary enquiries into cases involving an infraction of the Salt Laws, that certain parties had concealed in their houses illicit salt which would be found if a search were made. The Inspector took the depositions of the two prisoners, and, upon the information thus obtained, proceeded to the village of Doobrabaree; the houses of the suspected parties were pointed out by the two prisoners, and were placed under surveillance. Suddenly the attention of the Police Inspector was directed to something suspicious in the appearance of the cloth which was tied round the waist of the prisoner Soondur. The Inspector directed the witness Pootoo, who was in company with him, to search the prisoner Soondur. On doing so two earthen vessels, with illicit salt in them, were found on his person. In the prisoner Neemoon's hands were found an earthen pot with illicit salt in it.

There can be little doubt that the prisoners, who are informers, intended to place the illicit salt in the houses or on the premises of the parties charged, to serve as evidence against them.

The Inspector was conducting an enquiry preliminary to a proceeding before a Court of Justice. The investigation was, therefore, a "stage of judicial proceeding." The prisoners are, in my opinion, guilty of "attempting" to fabricate false evidence for the purpose of being used in a stage of a judicial proceeding.

The maximum punishment for the offence of "fabricating false evidence in a stage of a judicial proceeding" is seven years' imprisonment of either description. An attempt to commit the above offence is punishable under the provisions of Section 511 of the Indian Penal Code; but the term of imprisonment cannot extend beyond one-half of the longest term provided for the substantive offence.

Vol. III. The sentence of five years, which is more than half of seven years, is, therefore, clearly illegal. I reduce it to three years in the case of both prisoners. With this exception the conviction will stand.

The papers must be submitted to Mr. Justice Seton-Karr.

Seton-Karr, J.—This seems to me the legal sentence under the two Sections quoted by the Sessions Judge.

The 7th August 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges*.

Fine not awardable as compensation in cases under Chapter XIV., Penal Code—Record of proceedings in cases under Chapter XV.

Queen vs. Nijanund.

Referred under Section 434, Act XXV. of 1861, and Circular Order No. 15, dated the 15th July 1863.

A fine cannot be awarded as compensation in a case falling under Chapter XIV., Code of Criminal Procedure.

In a case falling under Chapter XV., the statement of the complainant, the evidence of the witnesses, and the reply of the accused, should be recorded.

READ a letter from the Sessions Judge of Hooghly, submitting certain proceedings of the Deputy Magistrate, under the provisions of Section 434 of the Code of Criminal Procedure.

There can be no doubt that the order of the Deputy Magistrate, inflicting a fine and awarding the same as compensation in a case which falls under the provisions of Chapter XIV. of the Code, is illegal. This has been ruled by this Court in the case quoted by the Sessions Judge.

The Court further observe that, had the offence fallen under the provisions of Chapter XV., the proceedings of the Deputy Magistrate in not recording the statement of the complainant, the evidence of the witnesses, and the reply of the accused person, were wholly illegal.

It is unnecessary to notice the other minor irregularities noticed by the Judge.

The proceedings of the Deputy Magistrate are quashed. The fine must be refunded. The papers may be returned to the Sessions Judge.

The 8th August 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges*.

Dacoity (under the Penal Code)—Plunder.

Queen versus Khoyrat Ally Beg, Nowab Khan, Gorachand Barick, Saboo Khan, and Tarrachand Saut.

Committed by the Deputy Magistrate of Tumlook, and tried by the Sessions Judge of Midnapore, on a charge of dacoity, &c.

The definition of dacoity in the Penal Code is so wide as to extend to what would have been treated as cases of plunder under the old law.

Seton-Karr, J.—THE pleader for the appellants in this case endeavours to make out that the evidence does not bear out the charge of dacoity, of which they have been convicted by the Sessions Judge; and that the facts disclosed by the evidence, even if relied on, do not show more than house-trespass and perhaps attempt to plunder. In support of this, the pleader relies on the inability or unwillingness of the complainant to proceed with the 3rd count, of dishonest retention of part of the plundered property, and on the consequent acquittal of the prisoners on this charge altogether.

The charge of dacoity with murder also, it is to be observed, fell to the ground, because the blow inflicted on the man Gorachand by one of the party who is not present did not fall on a vital part; the injured man subsequently dying of fever, which supervened.

I have gone through the material part of the evidence, which has been very carefully taken, and which is very voluminous, and am satisfied that there is quite sufficient to show that the prisoners, who are clearly identified by credible witnesses, did attack the house of the complainant, and did plunder it of certain properties, breaking boxes, and carrying away rice and some other articles.

The evidence of Srinibas, the Sub-Inspector, who happened by chance, in the execution of other duty, to be passing that way, is good in corroboration of the main facts

deposed to by the eye-witnesses ; the Sub-Inspector proves the fact, as he saw some traces of the outrage immediately after its occurrence. On the other hand, no great or permanent injury appears to have been done. Cattle belonging to the witnesses, Rabiram and Hari Puttur, if carried off, were almost immediately re-captured, and the complainant failed to identify any of the articles discovered in the houses of the prisoners, which were soon afterwards searched.

The Sessions Judge correctly remarks that the offence was not a dacoity, as such offences are commonly known in this country, but that it was a dacoity within the meaning of the law ; and he ascribes the origin of it partly to a private quarrel and partly to a "*dhurmāghat*," or organized system of resistance by ryots against their zemindar.

With these remarks I entirely concur. The popular and current notion of dacoity is that of an outrage committed, at the very dead of night, by a band of ruffians, whose heads are covered, and whose faces are disguised by chalk or some other mixture, and who have no private enmity with the peaceable and unfortunate house-holder, whom some one of the gang has previously, by secret enquiries, marked out for a prey. But the definition in the Penal Code of dacoity is very wide. It is decidedly an extension of the old law. Section 391 of the Code says that a dacoity can be committed by five persons who conjointly commit or attempt to commit *robbery*, or when the whole number of persons who conjointly commit the robbery, or of the persons present aiding the commission or attempt, amounts to the number of five.

There can be no question that this legal description fits the act of the prisoners, as described at some length by the various witnesses.

It may be well that ryots and servants of zemindars, and native residents in the interior, should know, for the future, that persons who commit the offence popularly known as "*loot taraz*," or plunder, which is an act unfortunately involving no moral torpitude whatever in the eyes of many natives, run the chance, under the present law, of a trial and conviction for the serious crime of dacoity.

The defence in this case is, as usual, *alibis*, which were not attempted to be supported ; but I am inclined to think, from the evidence of Jugeswar Bhooya, that some plea of attachment under legal process was put forward by the prisoners at the time of the attack. But no such plea was insisted on as part of the

substantial defence, and the prisoners had the advantage of being defended by a pleader of the High Court at the original Sessions. The truth seems to be that, in this as in similar cases, the complainant tells his story with exaggerations, and the line of defence taken does not at all assist the Court in reducing those exaggerations to the measure of strict truth. Looking to the above facts, I see no reason to doubt that the prisoners have been justly convicted ; and, had it been necessary, charges of unlawful assemblage and riot, accompanied with wounding, might have been drawn up against them.

On the other hand, I think the punishment of five years' rigorous imprisonment too severe for the offence. The act of wounding Giridhar Bhooya is shown to have been the independent act of a person not yet apprehended ; and, after all, the complainant does not seem to have suffered any extraordinary losses, nor the outrage to have been of a very aggravated nature. Certainly, if very valuable property had been carried off, the complainant, aided by the Sub-Inspector, had every chance of recovering the same.

Still, these attacks, committed in broad daylight, are very prejudicial to the peace of the district, and, as committed in open violation of law, encourage an habitual resort to lawlessness, and they must be punished.

But I think the offence will be adequately met by a sentence of two years' rigorous imprisonment, to which I propose to reduce that of five years.

The papers must go to Mr. Justice Kemp. *Kemp, J.* I concur. The sentence proposed by my learned colleague is sufficiently severe to meet the requirements of the case.

The 15th August 1865.

Present :

The Hon'ble F. B. Kemp, W. S. Seton-Karr, and E. Jackson, *Judges*.

**Imprisonment in default of payment of fine—
Distress and Sale of moveable property (whether ordered or not by the officer inflicting the fine).**

Queen versus Modosoodun Day and nine others.

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Referred by the Officiating Magistrate of the 24-Pergunnahs.

Held by the majority of the Court that an offender, who has undergone the full term of imprisonment to which he was sentenced in default of the payment of a fine, is still liable to have the amount levied by distress and sale of any moveable property belonging to him which may be found within the jurisdiction of the Magistrate of the District, whether the Officer who inflicted the fine issued any special directions on the subject or not (Seton-Karr, J., dissenting).

Seton-Karr, J.—This case has now been argued by the Government Pleader, who points to Section 61, Criminal Procedure Code, which says that it shall be "competent to the Court which sentences such offender, whether or not the sentence directs that, in default of payment of the fine, the prisoner shall suffer imprisonment, to issue a warrant for the levy of the amount by distress and sale of moveable property."

A ruling of a Bench of three Judges, in reply to a reference from Monghyr, is also quoted, which clearly lays down that imprisonment, suffered in default of payment of fine, does not exempt the property of the offender from being distrained and sold.

I am quite prepared to follow this ruling in ordinary cases, and to hold that the original Deputy Magistrate, who passed the sentence of fine and imprisonment, might have ordered the fine to be levied by distraint, either at the time of the sentence, or at any subsequent time, over and above the additional imprisonment undergone by the appellants. But I am not so clear whether another Deputy Magistrate, succeeding to him, has power to make such an addition. And I am quite clear that, when he at first refused to levy the fine by distraint, the Magistrate, if he thought the ruling of the Deputy Magistrate erroneous, ought to have referred it to this Court under Section 434, and ought not himself to have overruled the Deputy Magistrate. There was no appeal to the Magistrate, and, if the release of the property was wrong in law, the proper course was to refer the matter to this Court.

Under any view of the case, I should wish this case to be laid before Mr. Justice Kemp. I have great doubts whether a fresh Deputy Magistrate, either of himself or acting under the Magistrate's orders, could practically add to a sentence passed by his predecessor. Penal laws, it seems to me, should be construed strictly; and, if a provision for distraint and sale has not been ordered by the Magistrate who originally sentenced the offen-

der to imprisonment and fine, I do not see any way to an addition of this kind to be subsequently made by a different Magistrate.

In my view, I wish these papers to be laid before Mr. Justice Kemp.

Kemp, J.—I cannot concur with my learned colleague. An offender, who has undergone the full term of imprisonment to which he has been sentenced in default of payment of a fine, is still liable to have the amount of the fine levied by distress and sale of any moveable property belonging to him which may be found within the jurisdiction of the Magistrate of the District (*vide* Section 61 of the Code of Criminal Procedure).

The imprisonment is not to be taken as a satisfaction of the fine; nor, as it is put by the learned commentators, Morgan and Macpherson: "The offender is not permitted to choose whether he will suffer in person or in his property." There is, of course, a limitation to this process of levying the fine (*see* Section 70, Indian Penal Code). I observe that a Bench of three Judges have ruled in support of the view taken by me. The Deputy Magistrate, who first passed the sentence of fine in addition to imprisonment, passed no order, one way or the other, as to whether the fine could be levied or not under Section 61. Another Deputy Magistrate was of opinion that it could not be so. Doubtless this opinion was wrong, and the Magistrate would have acted more regularly had he referred the question to this Court under the provisions of Section 434 of the Code of Procedure. But, as the petitioners have themselves invoked the Court, and asked it to exercise its power of revision, there is nothing, in my opinion, to prevent the Court from exercising the powers vested in it by Section 404 of the Code of Procedure. I would reject the petition, and, unless the fine be paid, it must be levied by distress and sale of the moveable properties of the petitioners.

Jackson, J.—I am of opinion that, under Section 61, Criminal Procedure Code, the fine is leviable by distraint and sale of any moveable property belonging to the offender, which may be found within the jurisdiction of the Magistrate of the District; and that the fine may be levied in the mode as prescribed in that Section of the law, whether the officer who inflicted the fine issued any special directions on the subject or not. The Magistrate will be directed to proceed and levy the fine unless it is paid.

The 18th August 1865.

Present :

The Hon'ble W. S. Seton-Karr and E. Jackson, Judges.

Forfeiture of property of absconding offender.

Bishonath Sircar, *Petitioner.*

Referred under Section 434 of the Code of Criminal Procedure, and Circular Order No. 18, dated the 15th July 1863.

Forfeiture of property of an absconding offender, who appears within two years from the attachment of his property, should not be carried into effect until after a regular enquiry into the causes of the offender's absence.

Jackson, J.—THE Sessions Judge has fully stated the facts on which this reference is based. It is not necessary to repeat them.

We do not agree in the view of the law which the Sessions Judge has taken, but are of opinion that, as far as the points of law referred to by the Sessions Judge are concerned, orders of both Mr. Assistant Magistrate Norman and Deputy Magistrate Ahmed Ali are perfectly legal. The Sessions Judge thinks that the six months, during which an absconding person's property is not to be sold, is a *locus penitentiar*; and that, if he gives himself up within that time, he is entitled to a return of his attached property. But that six months has reference only to the sale of the property, and cannot be extended or applied to the accused with an effect which is not distinctly declared in the law itself. Such attached property, the law says, shall be declared to be at the disposal of the Government, if the accused does not appear within the time fixed in the proclamation; and it is for the accused, when he appears at any time within two years after the attachment, to satisfy the Magistrate that he has not been avoiding the process of the Court. It may be a doubtful question whether, if the property has not been declared to be the property of the Government before the accused appears, it can be so declared after he has appeared. The law does not lay down any express time when the order shall be passed: and if, by mistake or inadvertence, it has not been passed before the accused appears, we think it might be passed after he has appeared. In the present case, the accused, when he did appear, did not attempt to satisfy the Court that he had not evaded justice, and Mr. Assistant Norman consequently ordered that the attached property should remain at the disposal of Government. The accused afterwards peti-

tioned for its release, and explained the cause of his absence. The Deputy Magistrate was not satisfied with his evidence, and, holding that view correctly under the law, refused to restore it. Vol. 177.

But, though these orders of the two officers were perfectly legal, still we think that the previous order of the Assistant ordering the processes of attachment and proclamation were illegal, as he does not anywhere record on what grounds he was satisfied that the accused was absconding or concealing himself to evade justice. These processes are not to issue whenever a warrant fails of its effect. The officer sent to serve the warrant should be examined as to the measures adopted by him to serve it; and if, on his evidence, or in any other manner, the Magistrate is satisfied that the accused is evading justice, then and then only can the processes of proclamation and attachment issue. Not only in this case does it not appear that any such enquiry was made upon which it can be held that the Magistrate satisfied himself that the accused was absconding, but it is also clear that he made a most summary and cursory enquiry as to whether the explanation of the accused, after he did appear, was sufficient to account for the non-service of the warrant. The Deputy Magistrate disbelieves the witnesses, and that is all. The clause of the law allowing the property of a person who has evaded justice to be forfeited to Government is highly penal, and certainly should not be carried into effect only when it is quite certain that the accused did really abscond. Section 185 evidently contemplates that there shall be "a trial before a competent Court," and this implies that the evidence to prove that the accused was absconding, as well as his evidence in exculpation, shall be heard in his presence, and a judicial determination shall be come to upon the points. The Deputy Magistrate did not hold any such trial, and, on this ground, we think that his final order was illegal. It is reversed, and he is directed to hold a regular trial, and thereupon determine on the restoration or confiscation of the attached property.

Seton-Karr, J.—I do not altogether concur with the Sessions Judge in holding that the penalty for evasion of the warrant could never, under any circumstances, be legally imposed after the object of the Magistrate, *i. e.*, the appearance of the accused, had been obtained. But I do concur with the Sessions Judge, and with my colleague, in thinking that the Deputy Ma-

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On the whole, I am quite willing to consent to a reversal of the orders of the Magistrate. He should hold a new trial, and determine whether the property should or should not be released, looking as well to any evidence which may show where the prisoner was during the evasion of the warrant, as to the ultimate result of the proceedings and the acquittal of the prisoner.

The 19th August 1865.

Present :

The Hon'ble W. Morgan, F. B. Kemp, and W. S. Seton-Karr, *Judges*.

High Court as a Court of Revision—European British Subjects.

Queen versus Thomas Brae.

Baboo Juggadanund Mookerjee for the prosecution.

Mr. R. E. Twidale for the Prisoner.

Held by Morgan and Kemp, *JJ.*, that there was no error of law in the record to justify the Court's interference with the Magistrate's order of release of the prisoner.

Held by Morgan and Seton-Karr, *JJ.*, that the High Court, as a Court of Revision, under Section 404, Criminal Procedure Code, has no jurisdiction over European British subjects in criminal cases.

Kemp, J. THE case of this gentleman has come before this Court, as a Court of Revision, under Section 404 of the Code of Criminal Procedure.

This Court, on the Criminal Side, acts as a Court of reference, of revision, and of appeal. Under Section 404 of the Criminal Procedure Code, the Court acting as a Court of Revision "may," on the report of a Court of Session, or of a Magistrate, or whenever it thinks fit, "call for the record of any criminal trial, or the record of any judicial proceedings of a Criminal Court *within its jurisdiction*, in which it shall appear to it that there has been error in the decision on a point of law, or that a point of law should be considered by this Court, and may determine any point of law arising out of the case, and thereupon pass such order as to the Court shall seem right."

In this case we have had to satisfy ourselves in the best way available to us whether Mr. Thomas Brae is a European British subject or not. The record, as sent up

to us by the local authorities, does not afford any information on this point. Mr. Brae has appeared in person in this Court; he has submitted an authenticated copy of the Register of Marriages kept at St. John's Church (old Cathedral), Calcutta, and has further examined Mr. George W. Kellner; from this evidence, in the absence of anything to rebut it, we are satisfied that Mr. Thomas Brae is a European British subject.

The charge against Mr. Thomas Brae, as entered in the charge paper submitted by the Police, is that he voluntarily caused grievous hurt by means of an instrument for shooting, Section 326 of the Indian Penal Code. We note that Mr. Brae was not taken into custody, nor was any warrant issued for his apprehension. The Magistrate of Furreedpore (Mr. Walton) appears to have taken up the case in his capacity of Magistrate; his proceedings are signed "T. Walton, Officiating Magistrate."

**Note.*—The record does not disclose that he acted in any other capacity, nor have we been shown that Mr. Walton is a Justice of the Peace.

Under the provisions of Section 37 of the Code of Criminal Procedure, Mr. Walton, as Magistrate,

was competent to hold the preliminary enquiry into the present case, notwithstanding Mr. Thomas Brae could not be tried by any Court but this Court, exercising its extraordinary Original Criminal Jurisdiction. Mr. Walton being of opinion, after recording the evidence for the prosecution, and receiving a written statement from the accused party, that there were not sufficient grounds for proceeding further in the case (*vide* Section 41 of the Code of Criminal Procedure), inasmuch as he held that Mr. Thomas Brae's acts were justified, on the ground that nothing is an offence which is done in the exercise of the right of private defence, recorded an order to the effect that "the charge must be abandoned, and that it was unnecessary to proceed further with the case."

As Mr. Walton has not acted in this case in his capacity of Justice of the Peace, it is obviously unnecessary for this Court, important as the question may be when it does arise, to give any opinion as to the question whether, in the event of his having so acted, this Court would have had jurisdiction or not to revise his proceedings.

Reverting to Sections 404 and 405 of the Criminal Procedure Code, under which alone this Court can have any jurisdiction in the

present case, I would observe that there has been "no error" in the order of the Magistrate on a "point of law" (Section 404). The order is neither illegal, nor, under all the circumstances of the case, improper. The proceedings are also regular (Section 405). I therefore decline to interfere.

Seton-Karr, J.—We have now to consider the papers in the case of Mr. Brae, who had been discharged by the Joint-Magistrate of Furreedpore, after having fired at and wounded two Natives with ball. The grounds for the discharge without any commitment were simply that Mr. Brae, whose acts of firing with ball were admitted, had acted in self-defence.

The facts of the case are clearly given in the record, and have had our full attention. The case has been argued before us by Mr. Twidale on behalf of Mr. Brae, and by the Government Pleader on the other side, both as regards the reason given for non-commitment, and as regards a very important question of the jurisdiction of this Court.

We have been asked to consider the case, under Section 404 of the Code of Criminal Procedure, as a Court of Revision; but, when the case was first argued, it was urged for Mr. Brae, for the first time apparently in the case, that he was a European British subject, and that the appellate branch of the High Court had no jurisdiction, and could not order his commitment to the Original Side of the High Court, even if we thought that he had been improperly discharged, and that he ought to have been put on his trial formally, and either acquitted or condemned by the only tribunal competent to try him for the offence with which he had been charged. On this, we gave the pleader for Mr. Brae one fortnight's time to produce evidence that his client was a European British subject, and was entitled to all the privileges of such person in regard to commitment and trial.

In the Lower Court this question had not been distinctly raised, and the presiding official of the Court had acted apparently as Magistrate, and not as Justice of the Peace. This evidence has now been adduced before us. The marriage certificate of Mr. Brae's parents, duly attested, has been put into the Court, and Mr. G. W. Kellner has sworn before us that he believes Mr. Brae to be the offspring of that marriage, and that he always understood Mr. Brae's father to have been a European British subject, as he came out to India after the age of 21. Mr. Brae himself was educated in England, and, to

all appearance, is of English parentage and birth. Vol. III.

The Government Pleader having in no wise attempted to impugn or rebut this evidence, Mr. Brae is entitled to ask the Court to consider him as having proved his status of a European British subject.

Mr. Justice Kemp is of opinion that, as Mr. Walton has not acted in his capacity of Justice of the Peace, it is obviously unnecessary for this Court to give any opinion on the question whether, in the event of his having so acted, this Court would have had jurisdiction or not to revise his proceedings.

I cannot concur in this view. In my humble opinion, the question of jurisdiction is of the highest importance for this and for all other similar cases in future. And it most naturally arises, in this very case, in this way. The proceedings of any Magistrate would *prima facie* be liable to revision for an error of law by this Court, and, if nothing appeared on record, or had been urged by Mr. Brae to show that he was a European British subject, we might consider him as amenable to the local tribunals. The law on this point, as clearly laid down in the well-known case of *Calder vs. Halket*, and followed in other cases, is that the person claiming such privileges is bound to prove them. The Court is not to assume such status without proof. But the claim successfully preferred by Mr. Brae to the privileges of a European British subject places the case in a new light. Mr. Brae being, in our eyes, a European British subject, it becomes most necessary to see whether, if we should think on full consideration that further proceedings should be taken, we have really the jurisdiction to order such proceedings to be taken by a Justice of the Peace. If we have not, we should stay our hand. If we have, we can then go into the reasons given by the Magistrate for discharging Mr. Brae. It is, to my thinking, clear that the question of jurisdiction fully discussed by the pleaders on both sides is, as I have said, of paramount importance. I am informed, after search in the office, that Mr. Walton, who enquired into the case, is a Justice of the Peace.

And the question, then, is simply this, *viz.*, whether our Court on the Appellate side, using the powers of revision entrusted to it by Section 404, can interfere and direct a commitment, not to the Sessions at Furreedpore, but to the Sessions at Calcutta?

The Section quoted empowers us, whenever we think fit, to call for the record of any criminal trial, or the record of any judi-

Vol. III. cial proceeding of a Criminal Court, other than a criminal trial, in any Court within its jurisdiction in which it shall appear that there has been error on a point of law, and determine any points of law, passing thereon such orders as may seem right. The correctness or otherwise of an acquittal founded on a view of the legal right of self-defence would, it appears to me, involve a point of law.

I have no doubt that, under this Section, if a Magistrate had improperly or illegally discharged an ordinary British subject, amenable to local jurisdiction, on a misconception of the law as to self-defence, or of the particular province of a Magistrate, and of a Judge and Assessors, or Judge and Jury, respectively, we could interfere to direct the commitment of such a person, so that he should be either acquitted or condemned by a competent tribunal having final jurisdiction in the case. We could, I hold, either order the Magistrate to enquire further, or we might, through the Sessions Judge, order him to commit to the Sessions.

I have also no doubt that the Magistrate, as Magistrate, may hold a preliminary enquiry in cases triable by a Supreme Court of judicature, *i. e.*, by the High Court on its Original Side, although a Magistrate must be a Justice of the Peace in order to commit or hold to bail a European British subject (Sections 37 and 39, Criminal Procedure Code). I am also quite clear that, by Section 25, no person, by reason of birth or descent, is exempt from the Code of Criminal Procedure, provided that he be not tried before any Criminal Court which has not jurisdiction over him. Under this law, proceedings taken in the interior under the Code of Criminal Procedure against a European British subject would obviously end in a commitment to the original side of this Court, were there grounds for a commitment.

But, after consideration of these Sections, what I have very great doubts about is, whether this Court, in its Appellate Jurisdiction, can order a commitment of a European British subject to the original, *i. e.*, to the other side of the Court. No one, I suppose, will dispute the proposition that, by law, a Local Court could not commit to the Local Sessions, nor a Sessions Judge try a European British subject, nor our Court, *on its Appellate Side*, hear and confirm an appeal from such a conviction, or deal with the case at all, except to point out the entire want of jurisdiction. The final jurisdiction of the Local Courts over European British

subjects is limited to 500 rupees, and to cases of contempt of Court, by Sections 42 and 410 of the Criminal Procedure Code. But even then we have a power of revision by writ of *certiorari*, *i. e.*, of revision by the Original Side of the Court. How, then, can it be said that our Bench is competent by law to direct a Magistrate acting as Justice of the Peace, as he must act if ulterior proceedings are contemplated, to commit such a British subject to the Sessions held in Calcutta, or, what is very nearly the same thing, to take proceedings afresh with a view to such commitment? We must constantly bear in mind that, with the precise *status* and privileges now asserted by, and granted to, Mr. Brae, ulterior proceedings can have no other end in view. But, if the Appellate Court cannot, as a Court of Appeal, hear or revise the proceedings on the formal trial of a European British subject, it would seem, by parity of reasoning, that it cannot interfere to give directions that such a person ought to be tried in the only place or by the only Court in which, as the law now stands, he can take his trial.

The law is either ambiguous, or it is wholly silent on the subject. The Charter does not elucidate or throw light on the matter. Sections 21 to 28 of that deed expound what is to be the criminal jurisdiction of the Court, ordinary and extraordinary; but they do not appear to provide for this case, and they clearly contemplate the maintenance of the Original and Appellate Jurisdiction separate and distinct from each other, as they were before the amalgamation of the two Courts. I do not find anything in those Sections, which I have carefully studied, which would warrant me in saying that the law, as to venue, jurisdiction, and competence of the various Courts, has been at all changed: the High Court takes the place of the Supreme Court on one side, and of the Sudder Nizamut Adawlut on the other, but without complete fusion.

It is argued by the Government pleader, and it is not denied by the pleader for Mr. Brae, that, if there is a wrong or failure of justice, there ought to be a remedy or a means of setting the failure right. The remedy, if there has been a failure, might possibly be for the Government to move by its Advocate-General or Standing Counsel in the matter, and to direct him to apply to the Original Side of the Court, in order that further proceedings should be taken. It is possible, too, that, before the abolition of the

Grand Jury, any prosecutor or complainant, had the Magistrate refused to make a commitment, might have still had the right to apply to that body to find a true bill on a private indictment against any other person on any statutable or triable offence.

I say this, however, with some doubt as to the legal right of complainants so circumstanced. But before or since the abolition of the Grand Jury, I presume that the Law Officers of the Government might apply to the Original Side of the Court for a *mandamus*. But even here, as far as I have been able to obtain information on the subject, the *mandamus* could go no farther than to order a Justice of the Peace who had refused to entertain a case at all, or had alleged want of jurisdiction, where he obviously had jurisdiction, to take it up. I doubt very much if the Court could or would direct a Justice of the Peace to commit an accused person whom he had discharged for reasons given, and so bring on a trial. In England, a prosecutor who cannot get redress from one Justice of the Peace may apply to another in the same country for the commitment of the accused; but whether this sort of proceeding would be sanctioned in this country, or whether it would, on the whole, be conducive to the satisfactory administration of justice, if it could be sanctioned, may admit of question. I am strengthened in the view taken above as to the effect of a *mandamus*, by a case, in the Original Side of the High Court of Madras, reported at page 66 of Stokes's Reports. There Scotland, C.J., and Bittleston, J., refused to grant a *mandamus* to a Magistrate who had exercised his discretion, and had refused to entertain a criminal charge, and the Court seemed to think that errors of judgment could not be corrected by a writ of *mandamus*.

It is said that, with an amalgamated High Court looking to its object, these distinctions of procedure, and these doubts and difficulties of practice, ought not to occur. But all we have to do as Judges is to see whether the law confers on us jurisdiction, and most certainly in any case where the Court is asked to say if there has been a failure of justice, and to assume the power of directing action to be taken beyond the conclusions of the Local Courts, and in this case especially, involving as it does the consideration of special privileges, we ought not to move unless we are sure that we have jurisdiction; that our jurisdiction will never be called in question; and that it will lead to legal and satisfactory results.

We cannot give ourselves jurisdiction by Vol. III.
analogy, by force of deduction, ingenious reasoning, or preponderance of probabilities, if the law is silent.

I have thus argued this case simply to see whether we have jurisdiction, because, until we are sure of that, we ought to do nothing. I have, however, been carefully through the papers which have been duly commented on by the pleaders on both sides in open Court, and I have formed a definite opinion on the merits of the case as it stands, and on the view taken thereof by the Executive Authorities. But, if we have no jurisdiction, as in my opinion we have not, it is not necessary or expedient that I should express that opinion. The conclusion that I have arrived at is, therefore, that whatever remedy the Government, if it desires any further action, may be advised to take, we, on this side, cannot act. I have discussed this very important question from a different point of view to that taken by my learned colleague, Mr Justice Kemp, and I have further thought it right to consider whether, granting that there had been a failure of justice, any other remedy might not exist; but my conclusion is the same as that of Mr. Justice Kemp. The Court on this side has no jurisdiction in such a case, and no power of revision under Section 404 or under any other. As, however, the whole matter is somewhat complicated, involving a mixed question of the law suited to Europeans and the law suited to ordinary British subjects, I am of opinion that it would be very desirable if this case were referred to a third Judge.

Morgan, J. The record of Mr. Walton's proceedings, having been called for by the Court, must now be dealt with according to the provisions of Section 404 of the Code of Criminal Procedure. It is only as a member of a Court of Revision duly constituted by the High Court, and vested with the jurisdiction which formerly belonged to the Sudder Court, that I am (as I understand it) authorized and required to deal with this matter. That jurisdiction is, in the words of the 404th Section, to pass such order as to the Sudder Court shall seem right when the record called for shows either that the Magistrate's decision is erroneous in law, or that some question of law arises for decision out of the facts of the case.

The language of the Section appears to me to be hardly applicable to a Magistrate's proceeding in the conduct of a preliminary enquiry in a case triable by the Court of

III. Session, whether the result of such enquiry be that the accused person is sent for trial to the Court of Session, or is discharged.

The record shows that Mr. Walton, after hearing the complaint against Mr. Brae, and after examining several persons as witnesses, thought there was not sufficient ground for proceeding against the accused. Accordingly, the proceedings were dropped, and no summons or other process was issued. Seeing the nature of the offence charged, and that the acts done were admitted and justified as acts done in the exercise of the right of private defence, I think, upon the facts as stated by Mr. Walton in his written order, that the preliminary investigation ought to have been proceeded with, and that scarcely any matter that might be disclosed during its further progress could excuse the Magistrate from sending the case to a higher tribunal, in order that the circumstances, under which the accused had inflicted wounds by a gun loaded with ball, might be fully enquired into, and that the superior tribunals should determine whether or not the limits of the right of private defence had been exceeded.

I see no error in law in the record itself, although the evidence adduced in this Court may show that Mr. Walton should have acted, and should have described himself as acting, in his capacity of Justice of the Peace, and not as Magistrate of the district, nor any point of law to be determined; and it is not requisite in my opinion that we should give any further order. I think it needless to consider whether we, as a Court of Revision under Section 404, could, by our order, set the Magistrate again in motion, with a view to the committal of the accused person for trial. Mr. Brae is, it appears, a European British subject, and Mr. Walton is a Justice of the Peace; notwithstanding these facts, the proceedings of the latter were in his character of Magistrate, and they were not taken under the 41st Section of the Code. We, having ascertained that the former is a European British subject, should not, it seems to me, proceed farther as a Court of Revision under Section 404. Whatever may be the extent of our powers under that Section when dealing with a case within its scope, we can revise only "such cases tried by any officer or Court possessing Criminal Jurisdiction as (were formerly) subject to revision by the *Sudder Nizamut Adawlut*" (see Sec. 27 of the Letters Patent), and it is certain that a case in which the accused was a Euro-

pean British subject was not open to such revision.

The High Court possesses, by the Statute 24 and 25 Vict., Chapter 104, and by the Letters Patent, not only the power of revision and control formerly exercised by the *Sudder Court*, but also the powers which the Supreme Court possessed by its Charter over Justices of the Peace and others. The High Court may provide for the exercise of all or any of these powers by single Judges or Division Courts, and such Courts or Judges, if duly empowered, may exercise jurisdiction over all persons and matters as fully as the High Court itself. It does not appear to be either necessary or expedient to enquire what proceedings might, upon due application made in any case, be ordered or taken by the High Court, or by a Division Court vested with the powers of the High Court. It is enough in my opinion to say that, with our present powers, we cannot, as a Court of Revision, under the Section referred to, proceed farther.

The High Court has, I believe, ample power to control the proceedings of Justices of the Peace, and to compel them to proceed, if they improperly decline jurisdiction, and these powers it possesses in addition to the jurisdiction, Original and Appellate, vested in the Court by law.

The 28th August 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges*.

Prisoners (Pursuit of escaped) obstructing Public Servant in discharge of public functions—Jurisdiction (of Magistrate).

Dukhoo Pein versus Chundro Kant Chowdry, Pochai Sircar, and Kheru Poramanick.

Referred under Section 434, Code of Criminal Procedure.

Read a letter from the Sessions Judge of Rajshahys, dated the 7th August 1865.

Court peons may pursue into the yard of a lodging-house, the door leading into which is open, a prisoner who has escaped from their custody.

The offence of obstructing a public servant in the discharge of his public functions is not cognizable by a Magistrate, except with the sanction or on the complaint of the Court or public servant concerned, or, if such servant is an inferior ministerial servant, with the sanction or on the complaint of his official superior.

THE COURT concurs with the Sessions Judge that the Court peons were not acting

beyond their jurisdiction in pursuing, into the yard of a lodging house, a prisoner who had escaped from their custody, the door leading into the said yard being open. The ruling laid down by the late Acting Judge is wholly erroneous, and would be very prejudicial to the interests of justice.

The Court admit that an offence punishable under Section 186 of the Indian Penal Code is not cognisable by a Magistrate, except with the sanction or on the complaint of the Court or public servant concerned, or, if such servant is an inferior ministerial servant, with the sanction or on the complaint of his official superior (*see* Section 168 of the Code of Criminal Procedure).

Had the peons simply charged the defendant with a common assault, the case might have been different.

The Court thinks that it would have saved a good deal of trouble had this plea been raised at an earlier period. As it is, they have no option but to quash the proceedings. If the Civil Court, or the public servant referred to, now sanction the prosecution, steps may be taken by the Magistrate to retry the case. But this sanction is only given on the assumption that the principal defendant, sentenced to imprisonment, has not undergone any portion of his imprisonment. If any portion has been undergone, no fresh trial can take place; and if the minor defendants, Pochai and Kheru, have paid their fines, they should be refunded to them.

The 29th August 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Attempt to bribe Public Servant—Illegality of sentence—Duty of Judge to explain construction of document to Jury.

Queen versus Setul Chunder Bagchee, Appellant.

Committed by the Deputy Commissioner, and tried by the Judicial Commissioner of Assam, on a charge of attempting to receive

gratification for inducing, by illegal means, a public servant to show favor to a person. Vol. 288

A conviction on a charge of attempting to receive a gratification for influencing a public servant in the exercise of his public functions is illegal as disclosing a legal offence when it omits to state the person or persons for whom the gratification was obtained, or the public servant to be influenced in the exercise of his public functions.

A Judge ought to explain to the Jury the legal construction to be put on a document relied on by the prosecution.

Kemp, J.—This prisoner has been convicted by the Judicial Commissioner of Assam of the following offence :

That he, Setul Chunder Bagchee, on or about the 12th day of Magh 1271, B. S., at Gowalparah, attempted to obtain from a person by name Kamessooree for another person or persons, *names unknown*, a gratification as a reward for inducing a public servant in the exercise of the official functions of such public servant to show favor to a person, the said Kamessooree; and that she has thereby committed an offence punishable under Section 162 of the Indian Penal Code.

Sentence, three months' simple imprisonment, and to pay a fine of 50 rupees; in default of payment, further imprisonment for three months.

The trial was conducted with a Jury; the only evidence for the prosecution is a letter, which the prisoner admits to have written to his employer, by name Kamessooree. In this letter, which refers to a case in which that lady was plaintiff, occurs the following passage: "I have agreed to pay 30 rupees in the event of success. If, by God's will, we succeed, the money must be paid."

The prisoner avers that this passage refers to an arrangement which he had made with one Omesh Chunder, a pleader, to pay him 30 rupees over and above his legitimate fee in the event of success.

The Judicial Commissioner was, I think, wrong in leaving the construction of this passage in the letter, which, as I have already observed, was the only piece of evidence adduced by the prosecution, to the Jury. He ought to have explained to the Jury the legal construction to be put upon the document.

There is, however, another flaw in the conviction, which, in my opinion, wholly

Vol. III. vitiates it, and that is, that it discloses no legal offence.

It is not stated who the person or persons were for whom the gratification was obtained ; nor who the public servant was who had to be influenced in the exercise of his official functions.

Being of opinion that the conviction is illegal, inasmuch as it discloses no legal offence, I would quash it, and direct that the prisoner, who is on bail under the orders of this Court, be released. The paper must be laid before another Judge.*

Seton-Karr, J. I entirely concur. The letter of the prisoner disclosed no legal offence on the first charge of attempting to bribe a public servant, for no public servant's name was even mentioned ; and the Judicial Commissioner ought to have pointed out to the Jury the legal effect and bearing of the sentence relied on, even if there had been sufficient evidence to go to a Jury.

Of the charge of cheating, the prisoner was acquitted by the Jury.

The conviction is quashed.

The 29th August 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Insanity.¹

Queen versus Shah Mahomed.

Committed by the Officiating Joint Magistrate, and tried by the Sessions Judge of Rungpore, on a charge of voluntarily causing grievous hurt, &c.

Procedure in the case of an insane prisoner.

THE Judge, sitting in the English Department on a review of the abstract statement of prisoners acquitted by the Sessions Judge of Zillah Rungpore for May 1865, sent for the record of this case to satisfy himself of

* *Note.*—Charges must describe the imputed offence as nearly as possible in the language of the Indian Penal Code. (See also Forms of Charges, Chapter XIII., Code of Criminal Procedure, No. 3, or Section 161 of the Indian Penal Code.)

the legality of the Sessions Judge's proceedings.

The case has been laid before this Bench for orders. We find that the prisoner Shah Mahomed was charged with voluntarily causing grievous hurt, Section 326, Indian Penal Code. The prisoner, when arraigned, remained mute, and refused to plead. The Medical Officer deposed before the Sessions Judge that the prisoner was of unsound mind ; and yet, in the face of this evidence, the Sessions Judge, instead of proceeding under the provisions of Sections 389 and 390 of the Code of Criminal Procedure, went on with the trial, recording the evidence, and acquitting the prisoner of the crime on the ground of insanity, though the prisoner was admittedly incapable of making his defence.

This Court, holding these proceedings to be illegal, quashes them, and directs the Sessions Judge to proceed under Sections 389 and 390 of the Code of Criminal Procedure. The evidence need not here be taken. The Sessions Court will give a special judgment that the accused person is of unsound mind, and incapable of making his defence, and the trial must, therefore, be postponed.

As the offence of which the prisoner is accused is not bailable, the Sessions Judge must report the case for the orders of the Local Government, the prisoner being kept in safe custody pending the orders of the Government.

The 29th August 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Fine—False charge of Theft.

Juhoorun versus Girdharee Ram and Nuseebun.

Referred under Section 434, Act XXI. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Fine is not awardable as compensation for a false charge of theft.

UNDER the circumstances stated, the Court remits the fine of 10 rupees imposed on the complainant for a false charge of theft, the law not admitting such a fine as compensation under Section 270 of the Criminal Procedure Code.

RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 31st August 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-
Karr, *Puisne Judges.*

Misdirection to Jury—Confession of Prisoner.

Queen versus Gunesh Koormee.

*Committed by the Magistrate, and tried by the
Sessions Judge of Patna, on a charge of abet-
ment of murder.*

The prisoner retracted his statement when read over to him, and said that he was compelled to make it. The Judge, without making any enquiry or taking any evidence on the point, submitted the prisoner's statement to the Jury as a confession. HELD that the Judge was wrong in so doing, and that he should rather have charged the Jury not to accept the prisoner's statement as a confession.

THIS prisoner has been convicted of abetting the murder of Dookeeram. Sentence, transportation for life.

This trial was conducted with a Jury. To satisfy ourselves of the legality of the proceedings in this trial we sent for the record of the case, together with the Judge's charge to the Jury.

On perusal and consideration of these proceedings, we are clearly of opinion that there has been a misdirection to the Jury; and, further, that there is no legal evidence upon which the prisoner can be convicted.

That the deceased, a resident of Burdwan, who was travelling by rail with a large sum of money in his possession, was murdered and robbed while thus travelling, is very clear; but there is no legal evidence to convict the prisoner of the abetment of that murder.

The Judge in his charge to the Jury observes that the evidence of the first three witnesses named

man, and that that man had a large sum of money with him. He then proceeds to remark that "the principal witnesses are Meetun and Pultoo Singh." If the evidence of the former is believed, it is clear that the deceased, the prisoner, and three others not now in Court, were put into the railway carriage together, and that the next thing known is that the deceased was found murdered and robbed. "Pultoo Singh's evidence," observes the Judge, "does not go so far as the putting into the carriage, but it corroborates Meetun's as far as his opportunities of knowledge went, that is, up to the outer gate of the station: the two women who live with Pultoo also to a certain extent confirm these accounts."

The Judge then proceeds to remark upon the so-called confession of the prisoner Gunesh as follows: "The prisoner now denies his confession, and alleges he made it under the effects of fear, alleging that, amongst others, Pultoo Singh and Meetun compelled him to make it. Now, whatever may be said of the police, it is hardly likely that men who, according to the prisoner's story, were parties to the conspiracy, would have forced out a confession which implicated them. In withdrawing his confession on the 24th of March, it must also be noted that the prisoner precludes his withdrawal by saying, if his life were spared, he would tell something, and then goes on to say it was forced from him. The connection of these two expressions can hardly be made out, and I think you may fairly consider whether he then did not intend to add to his confession if he could get a promise of pardon, but, failing in this, turned round and denied it. You are the parties to judge of the truth or falsehood of the evidence and confession, and in your hands I now leave the case."

We are of opinion that the Judge was entirely wrong in submitting to the Jury the statement of the prisoner before the Magistrate as amounting to a confession; he should, in our opinion, have charged them not to accept it as a confession.

The Civil Surgeon. only goes to establish the fact of the murder, the identity of the murdered

The examination of the prisoner Gunesh before the Magistrate was recorded in English, and not in the language of the prisoner.

ol. IV. It is certified by the Magistrate that, when the statement was read over to the prisoner (the Magistrate does not say whether it was explained to the prisoner), the prisoner stated that, if his life were spared, he would tell something; that the prisoner then added that he was forcibly compelled to make the confession by Pultoo Singh, Meeton, the Inspector, and two constables.

Under Section 205 of the Code of Criminal Procedure, the examination of a prisoner must be recorded in his own language, and explained to him. The prisoner is at liberty to explain or add to his answers; and, when the whole is made conformable to what the prisoner declares to be the truth, the examination is to be attested by the signature of the Magistrate.

In the present case the prisoner retracted his statement when read over to him, and said that he was compelled by force to make it. The Judge, without making any enquiry or taking any evidence on the point, submits the statement of the prisoner to the Jury as a confession, and further tells them that they may fairly infer from the prisoner's intentions that his confession was a true one.

The evidence of Pultoo Singh and Meeton goes only—the first to prove, and the second to corroborate the fact that the prisoner and the deceased were put into the same railway carriage. Surely this is no evidence that the prisoner necessarily abetted the robbery and murder of the deceased. The two women-witnesses are Rudmee and Joonja. The former does not even mention the name of the prisoner; the latter, who is the wife of the witness Pultoo Singh, merely states that the prisoner came with Choonee Jemadar, who said to the deceased that, as he had missed the train, he would get him a ticket for the next train.

As we are of opinion that there has been a misdirection to the Jury, and that, further, there is no legal evidence upon which the conviction could be sustained, we reverse the conviction and sentence, and direct that the prisoner be immediately released.

The 4th September 1865.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson,

of Dacca.

Queen versus Jhugroo and ten others.

Committed by the Magistrate of Maldah, and tried by the Sessions Judge of Dinagpoore, on a charge of Dacoity.

Knowing of a design to commit a dacoity, and voluntarily concealing the existence of that design, with the knowledge that such concealment would facilitate the commission of dacoity, does not amount to an abetment of the dacoity.

Jackson, J.—I HAVE considered the evidence taken on the trial of these prisoners, and am of opinion that it proves very clearly that all the prisoners, with the exception of No. 14, Nibhorshee, committed the dacoity with which they are charged. I see no reason for interfering in their conviction or sentence. But I cannot concur with the Sessions Judge in convicting Nibhorshee of abetment of the dacoity. He knew of the design to commit the dacoity, and he voluntarily concealed the existence of that design, knowing it to be likely that he would thereby facilitate the commission of the dacoity. I would, under Section 118 of the Penal Code, reduce his sentence to seven years' rigorous imprisonment.

Seton-Karr, J.—I concur.

The 4th September 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Puisne Judges.*

**Jurisdiction of Deputy Magistrate
full powers of Magistrate—Violation of duty
by Police Officers.**

Referred under Section 434 of the Code of

A Deputy Magistrate exercising the full powers of a Magistrate has jurisdiction under Section 29, Act V. of 1861, to fine police officers for violation of duty.

READ a letter from the Magistrate of Pubna submitting a case under Section 434, and recommending that the sentence passed by the Deputy Magistrate be quashed as contrary to the interpretation of Section 29, Act

V. of 1861, laid down by the Lieutenant-Governor of Bengal in his Circular Letter No. 4332 of the 25th August 1864.

We observe that the Deputy Magistrate exercises the full powers of a Magistrate. Under Act V. of 1861, any persons within the General Police District, exercising all or any of the powers of a Magistrate, are held to be Magistrates. The Deputy Magistrate, after taking evidence, and on conviction, fined certain police officers for gross violation of their duties under Section 29, Act V. of 1861, and, in so doing, we fail to see any illegality in his proceedings.

We have sent for a copy of the Circular Order referred to, and are of opinion that the law is clear on this point, and cannot be overridden by the Circular in question. We refuse to interfere.

The 7th September 1865.

Present:

The Hon'ble C. Steer, F. B. Kemp, and W. S. Seton-Karr, *Puisne Judges*.

Wrongful confinement of a woman.

Queen *versus* Ameer Daraz and Roresh.

Committed by the Assistant Magistrate of Madareepore, and tried by the Officiating Sessions Judge of Dacca, on a charge of wrongful confinement of an abducted woman.

Held by the majority of the Court (Kemp, J., dissenting) that the prisoners were rightly convicted of wrongful confinement of a woman, the facts of the case showing that she never went willingly to the house of the prisoners, and was not a willing inmate while she was there.

Kemp, J.—THESE prisoners have been convicted, Ameer Daraz of an offence under Section 368 of the Indian Penal Code—sentence two years' rigorous imprisonment; and the prisoner Roresh of an offence under Section 346—sentence one year's rigorous imprisonment.

The prisoners are father and son; six other prisoners were committed with these two prisoners on a charge framed under

Section 366. They have been acquitted, the Sessions Judge being of opinion that there was not sufficient legal evidence to warrant a conviction. Vol. IV.

The *factum* of the abduction of the woman is, therefore, not established.

The woman was found by the police in the house of Ameer Daraz, and it is said that the son Roresh held a cloth over the woman's mouth to prevent her crying out.

The prisoners who have been acquitted are related to the woman, and the story of the prisoner Ameer Daraz is that he paid money to the relations of the woman, and obtained her in "*nikkah*."

This statement is borne out by the evidence, for the defence is by no means an improbable statement.

I utterly discredit that the prisoners wrongfully confined and concealed the woman, knowing that she had been abducted (*see* Section 368, Indian Penal Code).

It may be that the woman was not consulted in the matter, and that she did not approve of the connection.

I would acquit the prisoners. The papers must be laid before my colleague, Mr. Justice Seton-Karr.

Seton-Karr, J.—I regret that I am unable to concur with my colleague. The Judge's reasons for acquitting six of the prisoners are very illogical: for he first says that the charge against them is well founded, and then that there is not sufficient legal evidence for conviction, which is not the case, for the evidence was ample, if the Judge believed it. However, we have nothing to do with their case now.

But what is there to invalidate the clear evidence of the complainant herself and of the police constables as to the place where she was found confined, and to the efforts made by Roresh to stifle her voice. I cannot see that there is anything. Two of the witnesses of Ameer Daraz only *heard* of the alleged *nikkah*, and the third witness is not at all clear, by his own account, in his recollections of the asserted *nikkah*.

I consider that the evidence of the complainant and that of the police, and the entire absence of any motive on the woman's part for making a false charge, to be good grounds for a conviction of an offence very common in the Eastern districts, and I would not interfere.

Jol. IV. The case must go to a third Judge.

Steer, J.—The charge of abduction broke down, and the prisoners who were indicted on that charge were acquitted.

In regard to the charge of confining the woman Khotija, which has been preferred against the appellants, the evidence of the woman herself to that effect, and the evidence of the police who found her in confinement, are, I think, quite sufficient to sustain the conviction. I cannot doubt the truth of the woman that she was not a willing resident in the house of the prisoners; and, that being the case, the prisoners had no right to detain her, and are guilty of wrongfully confining her; that she went to the house of the prisoners willingly is, I think, very improbable; that there was no abduction of the woman Khotija does not seem to have been found by the Judge. There was no evidence to convict the parties who were charged with that offence, and they were necessarily acquitted; but the Judge did not doubt that the woman had been abducted.

The prisoners, whose case is now before the Court, are charged with wrongfully confining Khotija.

The evidence leaves no doubt on my mind that she was in confinement when she was released by the police. Was that wrongful confinement? If it was against her will that she was taken to the house of the prisoners, and if it was against her will that she was detained there, the case amounts to a wrongful confinement; and I agree with Mr. Justice Seton-Karr that they were rightly convicted, the facts of the case showing satisfactorily that she never went willingly to the house of the prisoners, and was not a willing inmate while she was there.

The 8th September 1865.

Present :

The Hon'ble G. Loch, F. B. Kemp, and
W. S. Seton-Karr, *Puisne Judges.*

**Administering deleterious drugs—
Grievous Hurt.**

Queen versus Joygopal, alias Junglee.

*Committed by the Joint Magistrate, and tried by
the Sessions Judge of Bhaugulpore, on a
charge of voluntarily causing grievous
hurt, &c.*

HELD by the majority of the Court (Seton-Karr, J., dissenting) that the offence of administering deleterious drugs, when life was not endangered, is punishable under Section 328, Penal Code, and not as for grievous hurt under Section 326.

Kemp, J.—THE prisoner was committed on a charge under Section 328 of the Indian Penal Code. The Sessions Judge adds and convicts on another charge—*viz.*, under Section 326, and sentences the prisoner to transportation for life.

I think the evidence sufficient to prove that the prisoners, with the intent to rob the witnesses Nos. 1 and 2, whom he had persuaded to travel with him, administered to them some stupifying, intoxicating, or unwholesome drug, with intent to commit or facilitate the commission of an offence (in this case, robbery), and knowing it to be likely that he would thereby cause hurt. The Sessions Judge, however, holds that, as an extra dose of the drug might possibly have endangered life, therefore the offence is grievous hurt under Explanation 8 of Section 320.

The medical evidence is to this effect, that the witnesses Nos. 1 and 2 were admitted to hospital on a statement that they had been drugged. Cold water to the head and emetics were the treatment observed; it is said they came to themselves after an interval, and went about their business. The medical officer then says: "I did not consider they were likely to die." Life was therefore not endangered. The original count upon which the Joint Magistrate, Mr. Peacock, committed the case was the correct one, and the sentence of the Sessions Judge under Section 326 of transportation for life is illegal.

I would convict the prisoner under Section 328 in concurrence with the assessors; and, as cases of this description are prevalent on the Grand Trunk Road, I would, as an example, sentence the prisoner, under Section 328 of the Indian Penal Code, to seven years' rigorous imprisonment.

The case must be laid before another Judge.

Seton-Karr, J.—I am inclined to allow the sentence to stand. The medical evidence is to the effect that the men only

ate a small portion of the poisonous or deleterious drug, and the witness does not appear able to answer for the consequence had the complaint eaten more of the poisoned fish. I think there was evidence sufficient to support the graver charge under Section 326, and, as there is no saying what the effect of a larger quantity eaten would have been, I would endorse the Sessions Judge's reasons, and would not interfere. Such deliberate crimes as that under notice, in which death or life seems to depend on pure chance, require a severe punishment.

The case must go to a third Judge.

Loch, J.—The fact of having administered some deleterious drug to the witnesses Nos. 1 and 2 is clearly proved against the prisoner. The question I am called to decide is whether the prisoner has committed an offence under Section 326 or under Section 328 of the Penal Code? Has he caused grievous hurt? The Sessions Judge thinks that the prisoner has committed the offence described in Section 326 because such drugs do endanger life and persons administering them are aware of this, but from ignorance are incapable of regulating the quantity sufficient to produce insensibility without causing death; that it is a mere chance whether a person eating too much of the drug escapes with life, depending as it does on the quantity of the food he eats, and the prisoner was callous whether these parties lost their lives or not. We must not, however, look to what might have happened, or to the fact that drugs of the kind a tourist red in this case are dangerous to life, but to the effect produced upon the parties who ate of the food, and whether that effect amounted to grievous hurt. Now, Clause 8 Section 320 of the Penal Code, describes, among other kinds of grievous hurt, "any hurt which endangers life." Were the lives of the parties who partook of this food endangered in consequence? The medical officer says, "I did not consider that they were likely to die, but they were senseless," and, if "they had eaten more they might have died," and, again, "I am of opinion that, if they had not been treated medically, they might have got well in a week or so." I do not think they would have died. Looking, therefore, at this evidence, and the facts that the parties were admitted into the hospital on the 23rd June, and were well enough to go to the cuicherry the next day, I do not think that the offence amounts to grievous hurt, but that the prisoner is guilty under

Section 328. I would sentence him to the full measure of punishment the law allows, viz., ten years' rigorous imprisonment, commutable to transportation, for it is very necessary that this system of drugging, which appears to be carried on to a large extent in Behar, should be suppressed by severe measures.

Kemp, J. I concur with Mr. Justice Loch in the sentence proposed by him, which, on reconsideration, I consider to be more in proportion to the enormity and prevalence of the offence than that proposed by me.

The 9th September 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Puisne Judges*

Extortion—Abetment of Extortion—Cheating.

Queen versus Meajan and Ohhoy Churn Doss,

Committed by the Deputy Magistrate of Malda, and tried by the Sessions Judge of Dinagapore, on charges of extortion and abetment of extortion respectively.

To amount to the offence of extortion, property must be obtained by intentionally putting a person in fear of injury to that person, and thereby dishonestly inducing him to part with his property.

The mere issue of a hookumnamah (to collect statistical information) by a police officer is no legal ground for a conviction of abetment of cheating or of extortion.

Kemp, J.—These prisoners are—the first a head constable, and the second, a deputy inspector of police, both in Zillah Malda.

The constable has been convicted of extortion, the deputy inspector of abetting that offence; sentence, each three years' rigorous imprisonment, and to pay a fine of 200 rupees.

It appears from the evidence that the deputy inspector, Ohhoy Churn Doss, issued a hookumnamah, which was entrusted to the prisoner Meajan. The object of this hookumnamah was to collect certain statistical information as to rates, &c. Many traders and shop-keepers paid small sums to the constable,

Vol. IV. which he levied from them without authority, under cover of the said hookumnamah : these sums were appropriated by the head constable.

I am of opinion that the prisoner Meajan cannot be convicted of the offence of extortion. To amount to the offence of extortion, property must be obtained by intentionally putting a person in fear of injury to that person, and thereby dishonestly inducing him to part with his property. In this case the constable told the shop-keepers and traders that an order had gone forth that they were to be taxed in small sums of four annas and eight annas per head. They fell into the trap and paid. It was more in consequence of their credulity than in consequence of any personal fear that they parted with their pice. The prisoner Meajan has been guilty of the offence of cheating. He deceived the traders and shop-keepers, and dishonestly induced them to part with their property. I would convict him of that offence, and would sentence him to one year's rigorous imprisonment (Section 417, Indian Penal Code).

I am of opinion that the prisoner Ohboy Churn Doss is not guilty of the offence of abetment of cheating. Beyond issuing a hookumnamah (to collect statistical information), which, it appears, is part of a police officer's customary duty in the district of Maldah, he took no part whatever in the after transactions, nor did he, as far as I can ascertain from the evidence, in any way countenance and abet the acts of the prisoner Meajan, or participate in the money levied by him. I would acquit him. The papers must be laid before my learned colleague, Mr. Justice Seton-Karr.

Seton-Karr, J.—I quite concur. The mere issue of a hookumnamah, however inexpedient and not unlikely to lead to extortion, is no legal ground for such a conviction, and other evidence to abetment there is none. The fine must be refunded also.

The prisoner Ohboy Churn is released, and the sentence of Meajan reduced as proposed.

The 12th September 1865.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
 Puisne Judges.

Kidnapping from lawful guardianship.

Committed by the Officiating Magistrate of Monghyr, and tried by the Sessions Judge of Bhaugulpore, on a charge of kidnapping a minor female.

To bring a case under Section 361 of the Penal Code, there must be a taking or enticing of a child out of the keeping of the lawful guardian without his consent.

Glover, J.—I DOUBT whether the prisoner can be punished under Section 361.

The girl Itwarea, according to her own statement, had run away from her father's house in consequence of ill-treatment on the part of her mother, and, meeting the prisoner on the road, had agreed to take service as a coolie. The place where the prisoner lived, and to which the girl was taken, was a populous suburb, where there were many houses, and where she could easily have called for and obtained assistance, had she been unwilling to remain. This, however, does not affect the prisoner's case, and I only mention the circumstance as the Sessions Judge has laid some stress upon it.

Was the girl, then, under her father's guardianship, when she fell in with the prisoner? I think not; she had voluntarily abandoned her house, and was running away. She was fourteen years old, and not, therefore, of such tender age as to lead to the supposition that she had strayed from home, and was to all appearance a free agent. She, when taken before the Magistrate, asserted that her parents were dead, and that she was going with her mother-in-law to Sylhet and Cachar; she now states that the prisoner made "eyes" at her, and frightened her into saying what she did; but this is an unsupported statement, and the girl's manner before the Magistrate must, as that official observes, have been satisfactory, or he would not have signed her registry ticket.

To bring the prisoner under Section 361, there must be a taking of the child out of the possession of the parent, and such a taking is not, in my judgment, disclosed by the evidence in this case.

I would release the prisoner. The papers must go before another Judge.

Kemp, J.—I concur; there was no taking or enticing the girl out of the keeping of her lawful guardian against his consent. The

The 11th September 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Puisne Judges*.

Kidnapping from lawful guardianship.

Queen versus Gooroodoss Rajbunsee.

Committed by the Officiating Joint Magistrate, and tried by the Sessions Judge of Dinagepore, on a charge of kidnapping.

A person, in carrying off, without the consent of her lawful guardian, a girl to whom he was betrothed by his father, who, after permitting her to reside occasionally in his house, suddenly changed his mind, and broke off the marriage, is guilty of kidnapping from lawful guardianship punishable under Section 363 of the Penal Code.

Seton-Karr, J.—I HAVE been over the evidence very carefully in order to see if there was any reason to place full confidence in the defence of the prisoner that the girl Dinno Monee had been betrothed to him, and had previously resided in his house on several occasions.

I believe that the Sessions Judge suggests the true explanation of the very different versions for the prosecution and the defence, and that there had been some previous talk of a marriage; whereupon the prisoner, when the marriage was broken off, without consulting the father of the girl, carried her off to his own house from the company of the two women, witnesses Nos. 3 and 4, and would not give her up until the police were sent for.

Looking at the case in this light, I think that there are grounds for even a lighter sentence than that passed by the Sessions Judge, and I would reduce the one year's rigorous imprisonment to four months.

Though no harm was done to the girl, the prisoner acted illegally in carrying her off as he did; and, on this ground, I think the conviction can be sustained under Section 363.

The papers must go to Mr. Justice Kemp.

Kemp, J.—I am of opinion that there is evidence to prove that the girl was betrothed to the prisoner by her father. For some reason which does not appear in the record, he father, after permitting his daughter to

reside occasionally in the prisoner's house, changed his mind, and broke off the marriage. Vol. IV.

The prisoner, meeting the girl in company with two females, carried her off to his house. He did not use any force, and he did not attempt to conceal her; when the police came, he delivered her up to them. He was wrong in carrying off the girl without the consent of her lawful guardian; and he has, therefore, committed the offence of kidnapping from lawful guardianship, an offence punishable under Section 363 of the Indian Penal Code.

I concur with my learned colleague in the mitigated sentence passed by him.

The 11th September 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Puisne Judges*.

Jurisdiction (of Assistant Magistrate)—Offence committed in the Civil Court—False verification of plaint—Principals and Agent.

Referred under Section 414, Act XXV. of 1861, and Criminal Order No. 18 of 15th July 1863.

In re Indro Chunder Bose.

A Deputy Collector having committed an agent for false verification of a plaint, the Assistant Magistrate acted without jurisdiction in having taken security from the agent for the appearance of his principals, before having obtained the sanction of the Deputy Collector to proceed against the principals.

We concur with the Magistrate. The call for security from the agent was made when the principals were not before the Court, and the act of the Assistant Magistrate was, therefore, without jurisdiction.

The Deputy Collector committed the agent for false verification of a plaint in an Act X. suit under Section 139 of the Indian Penal Code.

The offence was committed in the Court of the Deputy Collector, and it could not be entertained in a Criminal Court without his

Vol. IV. sanction previously obtained (*see* Section 169, Code of Criminal Procedure).

The Assistant Magistrate subsequently applied for the sanction of the Deputy Collector to proceed against the principals; but this was after he had taken security from the agent for their appearance, and after he had made the principals the defendants in the case. The security was illegally taken, and the agent is not liable, and the amount cannot be recovered from him; if he has paid, it must be refunded to him.

We observe that the principals were eventually acquitted of any offence.

The 12th September 1865.

Present :

The Hon'ble F. B. Kemp, W. S. Seton-Karr,
and F. A. Glover, *Puisne Judges*.

Riot attended with Murder.

Queen *versus* Bhunjun Pauray, Ram Dehal Aheer, Ramnath Aheer, Deepa Aheer, Bowker Hajam, Beharee Aheer, Bholel Aheer, and Sunker Hajam.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of murder.

Held by the majority of the Court (Seton-Karr, J., dissenting) that an attack made in the morning by an unlawful armed assembly, with the object of rescuing two thieves who had been captured during the night, and in which murder was committed, was a premeditated attack for which all concerned were liable to conviction for riot attended with murder.

Seton-Karr, J.—THE evidence in this case has been carefully taken, and little or nothing is advanced in appeal against the actual truth of the evidence, or as to the substantial conviction of some criminal offence.

But it is argued that the case of the two thieves, prisoners Nos. 40 and 41, is different from that of the remaining prisoners, whose offence is much lighter, and that these

latter prisoners ought not to have been convicted of the offence of riot attended with murder under Section 149, inasmuch as the affair was sudden, and all the members of the unlawful assembly could not have known that the death of Runjun was likely to be committed in prosecution of the common object of that assembly.

I do not think the Sessions Judge justified in terming the attack "premeditated." The prosecutor and other witnesses do, indeed, say that the two thieves got away, and immediately returned and attacked the capturing villagers, having procured *lathes* from their friends. But Soogrum Chamar says that the blows were given as the thieves got away; and certainly the whole complexion and character of the evidence leads to the conclusion that the attack was quite sudden, on the spur of the moment, and without serious premeditation.

As regards the two thieves who were lawfully captured, and then, being rescued, returned and killed the deceased Runjun, I do not see any reason to alter their conviction, or reduce their sentence.

But, as regards the others, I think they cannot be fairly said to have contemplated the death of one of the villagers as a likely or necessary and immediate consequence of the attack in which they joined. They may not have even had time to know that their fellow-villagers had been captured under a true charge of theft.

I think the offence of which they stand convicted by the evidence is that described in Sections 147 and 148, and, in this view, I would reduce the punishment of all the party, except the two thieves, to three years' rigorous imprisonment.

I would include in the category even No. 42, Bhunjun, who belongs to another village, and who was not mentioned before the Magistrate as having taken a more active part than the others, even though witnesses do say that he struck the deceased. The fracture of the skull was clearly caused by a blow from one or other of the thieves, and I can make no distinction in their particular case. But I think that Bhunjun may fairly claim to be considered in the same category as the five last prisoners, as he only joined when the others did.

I see no ground for acquitting Beharee, No. 45, whose active part in the riot is spoken to by the witness Gobind, and by Jewun Dhobee, according to the Sessions Judge's notes.

The case must go to Mr. Justice Kemp.

Kemp, J.—I cannot concur with my learned colleague. I observe that he considers the evidence for the prosecution to be rustworthy. The prisoners Nos. 40 and 41, with whose sentence the learned Judge would not interfere, went at night to rob the crops of the villagers of Sarunpore, and amongst them the crop of the deceased Runjun. As thefts were prevalent, the villagers were on the alert, and two thieves, with a portion of the stolen crop, were seized; those two thieves were the prisoners 40 (Ram Dehal) and 41 (Ramnath). The villagers of Sarunpore kept guard over them until the dawn broke, when, as they were taking them to the police thannah, some 50 men, residents of Rutunpore and the immediately adjacent village, came out armed with sticks; ticks were supplied to the two thieves by their partisans, and Runjun, the deceased, was struck to the earth with blows on the head delivered by the prisoners Nos. 40 and 41; No. 42 also struck the deceased, and the remaining prisoners were there actively aiding and abetting in this cruel and cowardly murder; some of the witnesses who were accompanying the party, who were taking the captured thieves to the police station, were severely beaten; one had his finger broken, another was seriously injured on the arm (he has not recovered the free use of it yet, says the Sessions Judge), and another in the chest. The prosecutor's party were acting legally; they were taking two thieves, caught red-handed, to the police station; the prisoners in large numbers sally out from Rutunpore armed with sticks; they supply ticks to the captured; they aid and favor their escape, and then join the two thieves in a murderous assault upon the men whose field had been wantonly robbed. The attack must have been premeditated, for fifty men do not collect in the early dawn armed with ticks unless with some common purpose and after consultation together. The common object of the assembly in this instance was clearly an unlawful one, viz., to rescue two captured thieves; and I quite agree with the Sessions Judge that they are one and all answerable for the result of the acts of that unlawful assembly, and that a severe example is requisite, as the use of the *lattee* with fatal results is becoming very prevalent in the Behar district, in which province people seem to think they may join an unlawful assembly, however illegal the common object may be, and however fatal the results, with perfect impunity as long as they do not personally strike "the fatal blow." I convict the

prisoners No. 42 (Bhunjun), No. 43 (Deepa), No. 44 (Bowker Hajam), No. 45 (Beharee Aheer), No. 46 (Bholel), No. 47 (Sunker), of riot attended with murder, and would sentence them as proposed by the Sessions Judge. The papers must be laid before a third Judge.

Glover, J.—I concur with Mr. Justice Kemp that the attack was premeditated, and carried out with the object of rescuing the two prisoners from lawful custody. These men had been captured during the night, and there was ample time for their friends to assemble, as they did, for the purpose of rescuing them on their way to the police station in the morning.

The 12th September 1865.

Present:

The Hon'ble F. B. Kemp, G. Campbell, and F. A. Glover, *Puisne Judges*.

Previous Convictions—Construction of Section 75, Penal Code.

Queen versus Hurpaul, Appellant.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Tirhoot, on a charge of theft.

Held by the majority of the Court (Campbell, J., dissenting) that Section 75 of the Penal Code only applies to convictions of offences committed after the Code came into operation.

Campbell, J.—I see no grounds whatever for this appeal, which I dismiss.

But, as a Court of Revision, I think it necessary to take notice of an important point of law in the judgment of the Sessions Judge. The case was one of a petty theft, but the Deputy Magistrate committed it to the Sessions, on the ground that the prisoner, having been previously convicted and sentenced to three years for theft, was liable to a more severe punishment under Section 75 of the Penal Code. The Sessions Judge's construction of the law is that, to make the prisoner liable under Section 75 of the Penal Code, the former as well as the present offence must have been committed at a time

Vol. IV. when the Penal Code was in force, and that, as the former case occurred in 1860, the prisoner is not so liable. I am inclined to think that the Deputy Magistrate was right. It is difficult to suppose that it was the intention of the Legislature, as it were, to condone all past offences, and that the most habitual thief on a fresh conviction can only be punished as for a single simple theft.

I rather think that Section 75 applies when the prisoner has been previously convicted of any one of those offences which are now punishable under Chapters XII. and XVII. of the Penal Code; and that, when the offence is of that nature that there can be no doubt of the identity of the offence under the old law, and under the new law (which is the case as regards theft), the rule of Section 75 may be applied without scruple. In this case, the theft having occurred in a dwelling-house, the Sessions Judge has given the prisoner seven years, on the ground which may meet the justice of the case; but, as the point of law is important, I refer it to another Judge.

Kemp, J.—I cannot concur with my learned colleague. The prisoner may have been guilty of the offence of theft in 1860; but clearly that offence was committed before the Indian Penal Code came into operation. Section 75 does not, therefore, apply, and, in my opinion, the interpretation of the law by the Sessions Judge is correct.

Section 75 of the Code enacts: "Whoever, "having been convicted of an offence punishable under Chapter XII. or Chapter XVII. "of this Code with imprisonment of either "description for a term of three years or "upwards, shall be guilty of any offence "punishable under either of those Chapters "with imprisonment of either description "for a term of three years or upwards, shall "be subject for every such subsequent offence to transportation for life, or to double "the amount of punishment which he would, "otherwise, have been liable for the same, "provided that he shall not in any case be liable "to imprisonment for a term exceeding ten "years."

Chapter XVII. refers, amongst others, to the offence of theft, of which offence the prisoner has been found guilty; but the former offence was committed in 1860, and was not an offence committed subsequent to the Penal Code coming into operation. The offence committed in 1860 is not punishable under

the Code, supposing the prisoner evaded justice. The procedure on his trial after apprehension for an offence committed in 1860 would be according to the Code of Criminal Procedure, but the punishment would be under the law in force before the Penal Code came into operation.

Both convictions, the former and the present, must be for offences punishable under the Code, and therefore committed after it came into operation (*vide* Morgan and Macpherson's Commentary, page 53); Section 75 does not apply. The case must go before a third Judge.

Glover, J.—I concur with Mr. Justice Kemp in thinking that both convictions referred to in Section 75 must be of offences punishable under this Code, and committed after it comes in force.

The words used in the Section are: "Whoever having been convicted of an offence," and "an offence" is by Section 40 declared to be "a thing made punishable by the Penal Code." The words denote only those acts which the Code punishes.

As, therefore, the previous conviction of theft took place before the Penal Code came into operation, Section 75 cannot apply.

The 12th September 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Puisne Judges.*

Admission of Crime made before formal accusation.

Queen versus Ram Churn Chamar, Heeraman Chamar, and Ramdihal Chamar.

Committed by the Deputy Magistrate of Sherghotty, and tried by the Sessions Judge of Behar, on a charge of culpable homicide amounting to murder.

An admission of crime, when fairly made after due warning, is not inadmissible, simply because, at the time it was made, no formal accusation had been made against the party making it.

Kemp, J.—The Sessions Judge has tried this case very carefully. The assessors are of opinion that the prisoners are guilty; and, after a careful consideration of

the whole case, I am of the same opinion. Concurring with the Sessions Judge, I uphold his conviction and sentence.

I cannot agree with the Sessions Judge that an admission of crime, when fairly made after due warning, is inadmissible simply because, at the time it is made, no formal accusation has been made against the party making it. Were the Judge's construction of the law correct, the statement of the convict Constance Kent in the late *case célèbre* would have been inadmissible, inasmuch as she was not accused of any crime when she made it. I reject the appeal.

Selon-Karr, J.—I concur in repudiating the doctrine laid down by the Sessions Judge, which, if regularly acted on, would be prejudicial to the ends of justice.

The 14th September 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Puisne Judges.*

Annulment of conviction and sentence by Court of Session—Reference of cases to High Court.

Queen versus Ichabur Dobey, Kallachand Neoghee, and Issur Chunder Roy.

Committed by the Magistrate of Jungeepore, and tried by the Sessions Judge of Moorshedabad, on a charge of causing hurt for the purpose of extorting confession, and abetment thereof.

It is only when a Court subordinate to a Court of Session convicts a person of an offence not triable by such Court, that the Court of Session can annul the conviction and sentence. If the prisoner is guilty of an offence beyond the jurisdiction of the subordinate Court, the Court of Session should refer the case to the High Court.

THE Deputy Magistrate of Jungeepore framed charges against these prisoners, under Section 323 of the Indian Penal Code, of voluntarily causing hurt; such an offence is

bailable and triable by any Magistrate. Under Section 15 of the Code of Criminal Procedure, the Deputy Magistrate was fully competent to try the charge. He did so, and punished the prisoners.

The Sessions Judge, without referring the case to this Court under the provisions of Section 434 of the Code, annulled the conviction and sentence of the Deputy Magistrate under the provisions of Section 427 of the Code, and directed the commitment of all the prisoners on a charge against Ichabur Dobey and Kallachand Neoghee, that they voluntarily caused hurt to Oomachurn Chuckerbutty for the purpose of extorting a confession from him of a theft with which he was charged (Section 330, Indian Penal Code), and against Kallachand Neoghee, and Issur Chunder Roy, that they abetted the commission of the above offence.

We are of opinion that the Judge has acted illegally and without jurisdiction, for it is only when a Court subordinate to a Court of Session shall have convicted persons of an offence not triable by such Court, that it is competent to the Appellate Court to annul the conviction and sentence. It is very clear that the original charges upon which the prisoners were arraigned and convicted were cognizable by the Deputy Magistrate.

In the case of Kallachand the evidence before the Deputy Magistrate and the Sessions Judge does not disclose any offence of which the Deputy Magistrate could not take cognizance, for, beyond slapping Oomachurn on the face, he does not appear to have taken any part in the extortion of a confession of the theft from him. The sentence passed by the Deputy Magistrate in his case was sufficient, and we restore it, acquitting him of the charge framed at the instance of the Judge.

With reference to the other prisoners, the evidence appears to us to disclose a crime of a higher grade than that punishable under Section 323 of the Indian Penal Code.

The offence of which the evidence shows these prisoners are guilty is beyond the scope of that Section and jurisdiction of the Deputy Magistrate. The Sessions Judge, therefore, should have referred the case to this Court. With reference to these prisoners, under Section 434, acting as a Court of Revision, we quash the order of the Deputy

et. IV. Magistrate, and the proceedings of the Judge, as he has acted without jurisdiction, and direct a legal commitment and fresh trial with reference to the prisoners Ichabur Dobby and Issur Chunder Roy.

The 16th September 1865.

Present :

The Hon'ble G. Loch and F. B. Kemp,
Puisne Judges.

Disputed possession.

(Criminal Jurisdiction.)

MISCELLANEOUS CASE.

Rajah Anundnath Roy, *Petitioner.*

In a case of disputed possession likely to lead to a breach of the peace, the Magistrate, instead of merely binding down the parties to keep the peace, and declining to interfere further, is bound to dispose of the question of possession under Section 318, Criminal Procedure Code.

Loch, J.—This is a dispute regarding the possession of the *ghuree dallan*, or entrance to the Rajbarree. Rajah Anundnath wished to repair the south side, of which he alleged himself to be in possession; he was opposed by the other branch of the family, who declared that he was not in possession.

As the dispute was likely to lead to a breach of the peace, the Deputy Magistrate of Nattore, proceeding under Section 318 of the Code of Criminal Procedure, held an investigation, and, finding Anundnath Roy to be in possession, directed him to be kept in possession, subject to the orders of the Magistrate.

On 24th September 1864, the Magistrate, after considering the decree of the High Court of 28th April 1865, and of an Act IV. award of 1848, held that the decree did not extend to this property, and he, therefore, declined to interfere, and bound down the parties to keep the peace. This order was confirmed by the Judge.

The Court concur in the opinion expressed by the Sessions Judge and Magistrate, that

the property now in dispute was not included in the decree of 28th April 1863, and that the effect of that decree, as distinctly stated in the judgment, was merely to restore things to the position in which they were placed by the Act IV. award of 1848. That award certainly did not relate to this property, but to land to the south of the *ghuree dallan*, and to the stables' dallan. But, having thus got rid of the decree as not applicable to this property, there was nothing to prevent the Magistrate from taking up the case, and disposing of the question of possession under the provisions of Section 318, and this must now be done. The case is remanded accordingly.

Kemp, J.—I concur in this order.

The 16th September 1865.

Present :

The Hon'ble C. B. Trevor and G. Loch,
Puisne Judges.

Jurisdiction of Magistrate (to interfere with civil rights of Landholders)—Establishment of Hauts.

MISCELLANEOUS CASE.

Sheeh Chunder Bhuttacharjee

versus

Saadut Ally Khan and Naziruddeen Chowdry.

A Magistrate cannot, under Section 62, Criminal Procedure Code, interfere with the civil right of a landholder to establish *hauts* within his estate, and to hold them on any day most convenient to him.

Trevor, J.—This matter has come before the Court under its general power of revision, and the question which it has to answer is whether an order prohibiting a landholder from holding a *haut* in a particular spot on his estate on particular days, inasmuch as such order is likely to prevent a riot or affray, is a legal order under the 62nd Section of Act XXV of 1861?

By that law a Magistrate may, by a written order, direct any person to abstain from a certain act, or to take certain order with certain property in his possession, whenever

such Magistrate shall consider such direction is likely to prevent, or tend to prevent, a riot or an affray.

I am clearly of opinion that these words do not authorize a Magistrate to interfere with the exercise of any of his ordinary rights by a landholder, merely because such exercise may require vigilance on the part of the police, and may, in the absence of such vigilance, lead to an affray. Now, amongst the rights of landholders is that of establishing *hauts* in any portion of their estates, to be held on whatever days seem most advantageous to them; and this right is not only an ordinary incident to the right of property, but it is in many instances a most valuable right. It is consequently not one with which the Magistrate can interfere under the power given to him by Section 62, Act XXV. of 1861. I would, therefore, reverse the order of the Deputy Magistrate of Manickgunge, dated 11th June 1864; and it will remain with the petitioner to hold his *haut* on whatever day seems most convenient to him.

Loch, J. I quite concur. I think that Section 62 refers to what would in England be called nuisances, and authorizes the Magistrate in such cases to interfere summarily. It does not give him authority to interfere with the civil rights of zemindars.

The 18th September 1865.

Present :

The Hon'ble G. Loch, F. B. Kemp, and W. S. Seton-Karr. *Prune Judges.*

Cheating—Breach of Contract.

MISCELLANEOUS CASE.

Sadoo Churn Pal, *Petitioner.*

Case in which the majority of the Court held that it was one of breach of contract, while Seton-Karr, J., was of opinion that the prisoner was rightly convicted of cheating under Sections 415 and 417 of the Penal Code.

Kemp, J.—THE petitioner has been sentenced to six months imprisonment and a fine of 300 rupees, 200 of which to be paid to the prosecutor as compensation for the offence of cheating. The Sessions Judge of Dacca on appeal confirmed the sentence.

On petition to this Court, I directed the

Sessions Judge to submit the record of the case in order that I might satisfy myself of the legality of the conviction (Section 404, Code of Criminal Procedure). In the meantime I directed the prisoner to be admitted to bail.

The pleader for the petitioner contends—

1st. That the circumstances, as detailed in the evidence, do not disclose a criminal offence.

2ndly. --That there is no evidence of dishonest intention.

I find on reading the evidence that the petitioner and others held a joint-decree against the prosecutor for Rs. 194-10. Execution was sued out, the property of the prosecutor attached, and its sale was imminent, when prosecutor is said to have entered into an amicable arrangement with the petitioner, agreeing to pay 154 rupees, provided a petition was filed in Court, and the sale was stayed. The petitioner did not fulfil this promise. The sale took place, and a portion of the property was purchased by the petitioner's vakeel. I hold that this is a simple breach of contract, for which the prosecutor, if so advised, has his civil remedy in a suit for damages. The prosecutor may have been led to expect that the petitioner would take measures to withdraw the execution process, and to stay the sale; but there is no evidence whatever that, at the time the petitioner agreed to settle matters for 154 rupees, it was then his intention not to do what he led the prosecutor to expect that he would do. The main element which constitutes the offence of cheating is, therefore, wanting, *viz.*, there was no intention then present to deceive, and thereby to induce the prosecutor to make conditional arrangements for an amicable adjustment of the decree. I would quash the conviction of the prisoner, and direct the release of the prisoner.

The papers must be submitted to my colleague, Mr. Justice Seton-Karr.

I also observe that the award of compensation to the prosecutor was illegal, the offence not coming under Chapter XV. of the Code of Procedure.

Seton-Karr, J.—This case can only be looked at by us under Section 404 of the Criminal Procedure Code. I hold, and have always held, that we cannot go into or criticise

Vol. IV. the evidence, and that any such attempt on our part would be highly prejudicial to the interests of justice. The case is one in which the decision of a Magistrate has already been confirmed, in regular appeal, by a Sessions Judge. All we can do is to consider if there has been error in a point of law.

I am well aware that the distinction between a criminal and civil liability is occasionally somewhat narrow, and that it is very necessary to take care that the Lower Courts do not confound different transactions, or make individuals liable to conviction and punishment, who ought properly to be only liable for a suit for breach of contract.

But in the present case I hold that there was quite sufficient, on the evidence, to justify the Court in drawing the inferences of cheating which they did draw, and in convicting the appellant under Section 417 of the Penal Code. The decisions, especially that of the Deputy Magistrate, are very clear and elaborate, and they show clearly that the appellant did receive the sum of 154 rupees, which he has stoutly denied ever having received; and that he did at length write a letter to his pleader, which also he, on trial, has denied ever having written. It is also clear that the property of the complainant was sold, and that he got nothing as an equivalent for the sum of 154 rupees which he had paid over to the appellant. Besides, this distinction between the criminal and the civil law was never pleaded in either of the Lower Courts, in which the appellant simply denied the receipt of any money from the complainant.

From these circumstances, *i. e.*, proof of payment, and the defendant's resolute denial of any such payment, and from the other facts, I think the Courts were quite at liberty to draw the conclusion that "the defendant at the time of receiving the money had never any intention of stopping the sale of the land." The Courts, in consequence, rightly convicted the appellant of cheating under Sections 415 and 417.

The defendant, to my thinking, did, "by deceiving, fraudulently and dishonestly induce the complainant" to deliver to him property (*i. e.*, 154 rupees) which he would not otherwise have delivered. The illustrations appended to the Section quoted (415) appear to me to fit this case very well.

Seeing, then, no illegality in the conclusions drawn from the evidence, I would

allow the conviction to stand. The case must go to a third Judge.

Loch, J.—I agree with Mr. Justice Kemp in thinking that this is a case of breach of contract and not of cheating, and that the prisoner Sadoo Churn should be released. On 23rd Magh 1271, he agreed to compromise a debt, under a decree in the name of his two brothers, with the complainant in this case, promising not to sell the debtor's property on payment of 154 rupees. The money was paid, but the property was advertised for sale on 25th idem, and the sale took place. From a petition presented by the complainant to the Civil Court on 14th March following, he stated that, in order to raise money to pay the debt, he had sold this property to a third party; that, on 25th Magh, he got a letter from Sadoo Churn to his vakeel, informing him of the compromise, but the vakeel, considering this to be a fraud of the debtor, allowed the sale to go on; that he went again to Sadoo Churn, who admitted having received the money in payment of his debt; but he was withheld by the representations of the auction-purchaser from presenting a petition setting forth the fact. In his deposition before the Deputy Magistrate, the complainant stated that he did not give Sadoo Churn's letter to the vakeel, till the 26th Magh, though he knew the property was advertised for sale on an earlier date; and, on his applying to the vakeel, the auction-purchaser, Juggobundo, told him to take 100 rupees and be satisfied.

From what has been stated above, taken from the complainant's own allegation, it does not appear to me that Sadoo Churn, in his dealings with the complainant, had any intention to cheat him. He never denied the payment. He gave the complainant means to stop the sale of the property, which, however, if complainant's story be true, the vakeel, for reasons best known to himself, refused to act upon, he being, as is alleged, one of the auction-purchasers. Sadoo Churn might have gone farther, and stopped the sale by going to Court, and informing the officer conducting the sale that he had received the money, or he might, subsequent to the sale, have cleared himself from blame by joining the complainants in a petition to the Court; but his failure to do so does not prove him guilty of cheating. I, therefore, concur with Mr. Justice Kemp in passing sentence of acquittal.

The 20th September 1865.

Present :

The Hon'ble G. Loch, F. B. Kemp, and W. S. Seton-Karr, *Puisne Judges.*

Jurisdiction—Power of High Court to mitigate or remit a sentence on a Special Criminal Appeal.

MISCELLANEOUS CASE.

Ramdhone Mundul and another, *Appellants.*

Under Section 405, Code of Criminal Procedure, the High Court cannot mitigate or remit a sentence passed by a Magistrate, and confirmed in appeal by the Sessions Judge, when there is no error of law in the conviction. In this case the sentence appeared to the Court to be excessive, but the Court could not interfere.

Seton-Karr, J.—We have sat together, and have read the only evidence on which the Magistrate has relied for the conviction of the talookdar Ramdhone Mundul for neglect of duty. The only point for our consideration is, whether there is any evidence to show that the talookdar knew, or had reason to believe, that an offence had been committed which he was bound to report.

We think that, though the evidence is not very strong against this particular defendant, there is still *some* evidence which would legally support the finding and conclusions of both the Lower Courts, and that we cannot interfere on any ground of want of sufficient legal evidence.

We are, however, of opinion that the talookdar has been sentenced to an extreme measure of punishment, being the utmost that the law allows. For my own part, I should be much inclined to remit the remainder of the sentence, if I felt certain that the law empowers us to make such a remission. But of this I have some doubts, and there seems to be a difference of opinion amongst us as to whether Section 405 can apply to this case at all. If only Section 404 applies, then I am clear that we cannot mitigate, as this latter Section only enables us to deal with a pure point of law, and we are both of opinion that there is no legal error in the decision. Section 405 would enable us to pass a mitigated sentence in a case tried by any *Court of Session*. But is a Judge sitting over a Magistrate, in regular appeal, a Court of Session? Is not the term, as used in Section 405, applicable only to a Judge regularly trying a case committed to him at the Sessions? This is

the point as to which some doubts exist; and, if the Section be restricted, then we have no power to mitigate, and can only deal with the case under Section 404, under which, as I have shown, we are both agreed there is no ground for interference. I should wish the case to go to a third Judge, if my colleague thinks us restricted to Section 404 only. I think this a good opportunity for settling a somewhat disputed or rather doubtful point.

Kemp, J.—In this case we are acting as a Court of Revision under Section 404, Chapter XXIX. of the Code of Criminal Procedure.

We did not call for the record of this trial on the report of a Court of Session or of a Magistrate. The prisoner invoked the aid of the Court, and undertook, through his learned counsel, to show that there had been an error in the decision of the Courts below on a point of law. After hearing the argument, we are both agreed that there has been no such error in law, and that the sentence, though severe, is strictly legal.

The provisions of Section 405, which give this Court the power of passing any mitigated sentence warranted by law, do not apply to the case before the Court, for this is not a case tried by a Court of Session. The Sessions Judge, as an Appellate Court, heard the appeal from the order of the Magistrate, and confirmed that order. I hold that, as we have determined that no point of law arises in this case, the only proper order that we can pass is to dismiss this special appeal. I attach very great importance to the decision of this question one way or the other. If, on a special criminal appeal, we can go beyond a dry point of law, and mitigate punishment, it may be said that we can go a little farther, and acquit altogether; and I cannot shut my eyes to the prospect of our Court being inundated with these special appeals. Every man who is put in jail for a month will be appealing on the question, not of the illegality, but severity of his sentence. (*See also* Section 428, Code of Criminal Procedure), which enacts that, except as provided in Section 405, sentences and orders passed by an Appellate Court *upon an appeal shall be final*.

Loch, J.—The question I am required to determine in this case is whether, under Section 405 of the Code of Criminal Procedure, this Court is empowered to reduce a sentence passed by a Magistrate, and confirmed

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Vol. IV. in appeal by the Sessions Judge, when there is no defect in the conviction on a point of law, but the sentence appears to the Court to be excessive.

Section 428, the last Section in the Chapter of Appeals, enacts that, except as provided in Section 405 of this Act, sentences and orders passed by an Appellate Court upon appeal shall be final.

Section 405 enacts that it shall be lawful for the High Court to call for and examine the record of any case tried by any Sessions Court for the purpose of satisfying itself as to the *legality* or *propriety* of any sentence or order passed, and as to the regularity of the proceedings of such Court. If it appears to the High Court that the sentence passed is too severe, the High Court may pass any mitigated sentence warranted by law. If the High Court shall be of opinion that the sentence or order is contrary to law, the High Court shall reverse the sentence or order, and pass such judgment, sentence, or order as to the Court shall seem right, or, if it deem necessary, may order a new trial.

How is the Court of Session, as mentioned in Section 405, to be regarded? Is it to be considered simply in its character of a Court of original criminal jurisdiction; and do "the cases tried" by it mean only those which are committed for trial before it by the Magistrates and other officers empowered to make committals? Or is it to be viewed in its two-fold capacity as a Court of original and of appellate jurisdiction? and do the words "cases tried by any Court of Session" refer to appeals from Magisterial authorities as well as to cases committed for trial?

It may be said that, if the provisions of Section 405 include cases decided on appeal, then Section 404 is superfluous. This is not quite the case. It is true that Section 405 would, under this view, include all appeals from the Magisterial authorities made direct to the Judge, but it would not include proceedings held by officers subordinate to the Magistrates, which do not come before the Court of Session. Section 404, therefore, provides generally for all cases in all Courts, and enables the High Court to rectify an error in law in the proceedings of all Courts subordinate to it, even in cases when there is no privilege of appeal.

It is urged, and no doubt with considerable force, that the exception made in Section

428 shows that Section 405 includes appeals, for the first-named Section distinctly enacts that sentences and orders passed in appeal by an Appellate Court shall be final, except as provided in Section 405.

It is necessary to determine, before going farther, the scope of Section 405. It forms part of the Chapter which gives the High Court power to *revise* the proceedings of the Lower Court without an appeal. The first two Sections of Chapter XXIX. (Sections 402 and 403, Criminal Procedure Code) provide for the revision of sentences passed by the Courts of Session in cases committed for trial before them on examination by a Judge of the High Court of the abstract statement of prisoners punished without reference to the Court. The third Section of this Chapter (404 of the Code) provides for the interference of, and revision by, the High Court of sentences and orders passed by the Lower Courts in criminal trials and miscellaneous cases, and empowers the Court, on discovery of an error in the decision on a *point of law*, to pass such order as shall appear to be right. Then comes the Section of which the purport is disputed, and the Chapter closes with a Section which provides for the due certification of the orders passed by the High Court to the Lower Court, and the course to be followed by the Lower Court. Looking, therefore, at the Chapter as a whole, there is not one word relating to appeals in it.

By examining the wording of the Sections comprised in this Chapter, the purport of Section 405 will be brought out. It cannot be disputed that Sections 402 and 403 relate to cases committed for trial to the Court of Session by the Magistrates and officers empowered to make committals. Now, the words used in these two Sections, with reference to such trials, are these: "The *Sudder Court* in *any case tried by the Court of Session*, in which, upon a review of the abstract statement or calendar of prisoners punished without reference," and the very same words are made use of in Section 403: "It shall be lawful for the High Court to call for and examine the record of *any case tried by any Court of Session*." The words in italics are in Sections 402 and 403 restricted to cases committed for trial before the Court of Session. There is nothing to indicate that their meaning is amplified in Section 405; and, if we look farther to the closing words of the Section, it will more clearly appear that the words are restricted to cases

committed for trial, for these words enact that, if the sentence or order is contrary to law, the High Court shall reverse such sentence or order, and pass such judgment, sentence, or order as to the Court shall seem right, *or, if it deem necessary, may order a new trial.*

What, then, it will be asked, is the meaning of the exception made in Section 428, the last Section in the Chapter of Appeals, if Section 405 have no reference to appeals? The only solution to this question is that it is a misprint of Section 405, instead of Section 404; and, in considering the words of Section 428, this will be obvious, for Section 428 declares that all sentences and orders passed by an Appellate Court upon appeal shall be final, except as provided in Section 405. The finality of such sentences and orders, however, is liable to be disturbed by the provisions of Section 404, by which the High Court can reverse the sentence or order of any subordinate authority passed in criminal trials or miscellaneous cases, when there is an error in the decision on a point of law; and, as it is evidently the object of the law to allow of one appeal on the facts, and only one, I think the interference of the High Court is, in cases tried by the Magisterial authorities, and heard in appeal by the Court of Session, restricted within the limits of Section 404 to a point of law. By substituting Section 404 for 405, the reading of Section 428 becomes consistent with the rest of the law. If Section 405 be the number intended by the Legislature, then Section 428 contains an incorrect statement: for, as shown above, sentences and orders passed by an Appellate Court are also liable to be set aside for any legal defect under the provisions of Section 404. But, if Section 405 be limited, as its terms appear to indicate, to cases committed for trial, and Section 404 be substituted in Section 428, the law becomes consistent. It appears to me, therefore, that Section 405 is by its terms restricted to cases committed to the Court of Session for trial, and that, in cases in which the Court of Session sitting in appeal has confirmed the sentence passed by the Magistrate, the action of this Court must be confined to the restrictive terms of Section 404; and, in the event of there being no error of law in the decision, this Court has not authority to apply the provisions of Section 405 to the case, and mitigate or remit the sentence. Under this view of the law, I think that this application should be rejected.

The 24th October 1865.

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Present:

The Hon'ble F. A. Glover.

Puisne Judge.

Grievous Hurt— Punishment for cutting off wife's nose for intriguing.

Queen versus Sulamut Russooa.

Committed by the Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of grievous hurt.

The amount of punishment for cutting off a wife's nose for intriguing with another man depends on the time of the commission of the grievous hurt, whether at the instant, or long after the husband found himself dishonored.

THE prisoner in this case confessed to the Sessions Judge to having cut off his wife's nose, and he has, therefore, been rightly convicted under Section 326 of the Indian Penal Code.

The only question is as to the amount of punishment. The prisoner's statement is that his wife had an intrigue with Sheekut Rajooa; that he had caught her in the act of dishonoring him; and that he had remonstrated with her over and over again; but that, notwithstanding his remonstrances, on awaking one night, he saw his wife's paramour running out of the room. Now, taking this to be true, which I conceive the Court was bound to do, inasmuch as confessions, when they form the sole evidence against a prisoner, must be taken as a whole, I should have considered a very light punishment sufficient for the ends of justice, had the prisoner attacked his wife at the instant of finding himself again dishonored. He had received the gravest provocation, and his wife appears, from her own statement to the Deputy Magistrate, to have been a woman of the most worthless character, and to have admitted her intrigue with her brother-in-law in the most unblushing manner.

But it is clear from the prisoner's own confession that he took time to cool down, and allowed his wife to go to sleep (and that not immediately, but after subjecting her to a storm of reproaches) before committing the assault upon her, and, under these circumstances, I do not think that the sentence passed by the Sessions Judge is too heavy.

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The 24th October 1865.

*Present :*The Hon'ble F. A. Glover, *Puisne Judge*.**Evidence—Admissions of prisoners before Magistrate—Sessions Judge's notes of evidence.****Queen versus Bhugwan Dosadh and Mudden Dosadh.***Committed by the Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of dacoity.*

The admissions of prisoner in their own statements before the Magistrate ought to be given in evidence at the trial.

A Sessions Judge's notes of the evidence should be sent up in a legible form.

I SEE no sufficient reason to interfere with the Sessions Judge's conviction of dacoity in this case ; part of the stolen property was found in the houses of each of the prisoners, and the identification of it, by the prosecutor and his witnesses, is satisfactory. But the case is made much stronger against the prisoners by their own statements before the Magistrate, in which they admit having accompanied the dacoits, and having received part of the plunder afterwards. These admissions ought to have been given in evidence at the trial under Section 366 of the Code of Criminal Procedure, and I do not understand why the Sessions Judge omitted them. I remark, on looking over the evidence, that a great deal of irrelevant matter has been admitted. The confessions of the prisoners to the police, for instance, are detailed at length, although they were not evidence ; for the discovery of the brass *gurrah* does not appear to have depended on them.

So much for the case itself. In addition, I desire that the Sessions Judge's attention should be drawn to the extreme illegibility of his notes of the evidence. In parts they are absolutely unreadable, and I have had to refer to the original record in order to arrive

at the meaning. Now that the vernacular record is done away with, it is more than ever important that the Judge's notes should be sent up in a legible form.

The 25th October 1865.

*Present :*The Hon'ble F. A. Glover, *Puisne Judge*.**Sessions Judge—Summing up of evidence, and ground of decision—Sentence (how to be recorded).****Queen versus Aruj Shaikh.***Committed by the Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of murder, &c.*

Under Sections 379 and 382, Code of Criminal Procedure, a Sessions Judge should sum up the evidence on both sides, and record the ground of his decision, and the sentence, when passed, should be recorded in a certain specified form.

It is clearly proved by the evidence of the witnesses for the prosecution, and by the confession of the prisoner before the Magistrate, that the deceased was first kicked, and afterwards struck with a "*boyta*," or hemp mallet, and that she died very shortly after the assault. The prisoner admitted before the Sessions Judge having kicked his wife, although he denied striking her with the mallet. He called no witnesses, and his denial is altogether unsupported.

I think, therefore, that he has been rightly convicted.

I observe, in connection with this and other appeals from the Sessions Judge of Rajshahye, that there has been no summing up of the evidence, nor any reasons given for considering the crime proved against the prisoner, whilst the order of the Court itself is signed with initials only.

I think it very possible that the record has been sent up in an incomplete state, and that the Sessions Judge's summing-up and sentence have been left behind. Should, however, that not be the case, the Sessions Judge's attention should be called to Sections 379 and 382 of the Criminal Procedure Code, under which it is necessary that the Judge should record the ground of his decision, and that the sentence, when passed, should be recorded in a certain specified form. *Vide* Clauses 9, 10, and 11, Section 382.

The 25th October 1865.

Present :

The Hon'ble F. A. Glover, *Puisne Judge*.

**House-breaking by night—Lurking House
Trespass by night.**

Queen versus Kenaram Bousee.

*Committed by the Assistant Magistrate of
Raneegunge, and tried by the Sessions Judge
of West Burdwan, on a charge of lurking
house trespass.*

When the door of a shop was found broken open—
HELD that the conviction should have been for house-
breaking by night, and not simply lurking house
trespass by night.

THE prisoner was taken red-handed, and
the evidence leaves no doubt of his guilt.

I therefore confirm the order of the Ses-
sions Judge, remarking, however, that the
conviction should have been for "house-break-
ing by night, &c.," and not simply "lurking
house trespass by night, &c.," as the door of
the mahajun's shop was found broken open.

As, however, the punishment awardable
under Section 457 of the Indian Penal Code
is the same for both offences, there is no
necessity for amending the conviction.

The 26th October 1865.

Present :

The Hon'ble F. A. Glover, *Puisne Judge*.

**Sessions Judge—Ground of Decision—Memo-
randum of precise offence.**

Queen versus Bhubunnesshur Gossamy.

*Committed by the Deputy Magistrate of Seraj-
gunge, and tried by the Sessions Judge of Raj-
shahye, on a charge of theft, &c.*

The grounds of a Sessions Judge's decision should be
given in English, and a memorandum recorded, in accord-
ance with Section 382, Code of Criminal Procedure, set-
ting forth the precise offence of which the prisoner is
convicted.

THIS case was remanded by the High
Court on the 10th January last in order
that the witnesses summoned by the prisoner
might be examined.

This has now been done as far as was prac-
ticable, and Prohlad Sandial, the person in
whose presence Prosunno is said to have
given the ornaments to the prisoner, denies the
ransaction *in toto*.

That the prisoner absconded immediately
after the theft (immediately he was released
by the police, that is) there is no doubt,
and that he was found two months after-

wards in the Province of Assam, with a **Vol. IV.**
quantity of the missing jewels in his pos-
session. His defence that one of the share-
holders gave him the ornaments to keep for
him, and sent him off to Assam, hoping by
these means to gain sole possession of valu-
able property, is entirely unsupported, and I
see no reason for interfering with the Sessions
Judge's orders.

I remark, however, for his information
and guidance, that the grounds of his deci-
sion should have been given in English, and
a memorandum in accordance with Section
382, Code of Criminal Procedure, setting
forth the precise offence of which the prison-
er was convicted. There is nothing on the
record beyond a vernacular roobocaree to
show the extent of punishment inflicted.

The 26th October 1865.

Present :

The Hon'ble F. A. Glover, *Puisne Judge*.

**Murder (Conviction of)—Confession of Prisoner
—Absence of body.**

*Queen versus Petta Gazi, Ali Hossein,
and Wazuddeen.*

*Committed by the Deputy Magistrate, and tried
by the Sessions Judge of Chittagong, on a
charge of murder, &c.*

When prisoners confess in the most circumstantial
manner to having committed a murder, the finding of
the body is not absolutely essential to a conviction.

THE only direct evidence against these
prisoners is their confession to the Deputy
Magistrate. The prisoner Petta's statement
at the Sessions is simply an admission of
homicide by misadventure, and the other two
prisoners deny being implicated even in that.

But the confessions to the Deputy Magis-
trate are remarkably clear and consistent.
The effect of them is that the deceased had
an intrigue with the prisoner Petta's wife,
and that the injured husband plotted with
the other two prisoners to lie in wait for the
deceased on his next visit ; that they attacked
him with *lattees* on that occasion, and killed
him outright, burying his body afterwards
in a *chur* close by a *khal*.

They stated the same thing to the Police
Inspector, and the deposition of that officer,
with regard to so much of their confessions
as led to the discovery of the grave in which
they had buried their victim, may be received
in evidence under Section 150, Code of
Criminal Procedure.

Vol. IV. The body was not found in the grave, but two pieces of clothes were; these have been satisfactorily identified as having been worn by the deceased on the night of his disappearance, and the strong smell of decomposed animal matter proved in the Inspector's opinion that a body had been recently exhumed.

There were marks on the earth close by as if a body had been dragged along.

There is no evidence to show what became of the corpse. The probabilities are that the prisoners themselves exhumed it, and threw it into the *khal*; but, as they have confessed in the most circumstantial manner to having killed the deceased, the finding of the body is not absolutely essential to a conviction.

No evidence has been tendered by the prisoners in support of their defence before the Sessions, and I therefore see no reason to interfere with the Sessions Judge's orders.

I think, however, that some notice ought to be taken of the conduct of the police. The Inspector took no notice of the deceased's wife's first application; and, after a second, when a direct charge was made that the husband had been made away with, the police took more than a week to proceed to the place; from first to last, three weeks were wasted.

The 28th October 1865.

Present :

The Hon'ble F. A. Glover, *Puisne Judge.*

Whipping (in addition to Imprisonment).

Queen versus Amarut Sheikh.

Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of theft, &c.

In order to legalize whipping in addition to imprisonment in the case of a second conviction, the offence must be the same in both cases.

No point of law is taken in this appeal, nor any objection preferred to the summing-up of the Judge. The appeal is, therefore, inadmissible.

I remark, however, with reference to the punishment of stripes awarded under Act VI. of 1864, in addition to the three-and-a-half years' imprisonment, that, in order to legalize the whipping, the offence must have been the same in both cases. The Judge was, therefore, wrong in awarding stripes under the first head of the charge, inasmuch as that conviction was for theft in a building, whereas the former conviction was for dishonestly retaining stolen property

knowing it to be stolen; the jury should have been told that, if they found the prisoner guilty of theft, they should have brought in a final verdict of *not guilty* on the second count, knowingly having in possession the stolen property being under the circumstances of this case part and parcel of the original offence of theft.

As, however, the prisoner has been convicted on the second count, the punishment of stripes, which is in that case for a second conviction of the same offence, may stand.

The 6th November 1865.

Present :

The Hon'ble G. Loch and F. A. Glover,
Puisne Judges.

Jurisdiction—Power of Sessions Judge to enhance sentence on Appeal.

*Queen versus Buloram Doss.**

Committed by the Joint Magistrate, and tried by the Sessions Judge of Bhagulpore, on a charge of extortion.

A Sessions Judge has no authority to enhance a sentence on appeal.

Glover, J.—THIS is an appeal from the orders of the Sessions Judge of Bhagulpore, amending a sentence passed by the Joint Magistrate of that District.

The appeal is not preferred on any point of law, and is, therefore, inadmissible; but I observe that the Sessions Judge has, on the ground of the serious nature of the offence proved under Section 385 of the Indian Penal Code, enhanced the punishment from four months with fine to one year with a fine of 200 rupees.

This is an illegal sentence, and must be quashed. Section 419 of the Code of Criminal Procedure gives an Appellate Court power to alter or reverse the finding and sentence or order of a Lower Court so long as the punishment awarded be not enhanced. The Sessions Judge, therefore, had no power to increase the punishment inflicted on the appellant from four months to one year, however much he might have thought the first sentence insufficient.

His order should be cancelled, and the Joint Magistrate's sentence restored.

The papers must go before another Judge.

* "This decision does not conflict with the decision in the case of Ramnarain Sing, decided 14th October 1863 (Rev., Jud., and Pol. Journal, vol. 2, p. 161). In the present case the Magistrate, after taking the additional evidence, passed a fresh sentence; in the former case the Magistrate merely took the additional evidence, but the Judge passed a fresh sentence."—Editor.

Loch, J.—The Joint Magistrate's sentence passed upon the prisoner, after hearing the additional evidence taken by direction of the Judge, may be too lenient; but as the case was one which could be disposed of by that officer, the Sessions Judge had no authority to enhance that sentence when the case came before him in appeal. His order is, therefore, contrary to law. I concur with Mr. Justice Glover's order.

The 7th November 1865.

Present :

The Hon'ble G. Loch and F. A. Glover,
Puisne Judges.

Grievous Hurt—Want of intention or knowledge.

Queen versus Umbica Tantinee and another.

Committed by the Deputy Magistrate of Bancorrah, and tried by the Sessions Judge of West Burdwan, on a charge of grievous hurt.

Causing grievous hurt on grave and sudden provocation is punishable under Section 335 of the Penal Code without any intention or knowledge of likelihood of causing such hurt.

Glover, J. Of the facts of this case there can be no doubt, and the evidence makes it quite clear that the prisoners assaulted the woman Dashee, being provoked thereto by her abuse and her throwing stones at them, and that the wound inflicted, though slight in itself, eventuated in erysipelas and fever, and placed the party receiving it in a state of some danger for three or four days.

Section 335, Indian Penal Code, omits the word "voluntary," and therefore I see no reason to interfere with this conviction. Had Section 335, like all the previous Sections bearing on the point, contained that word, I should have held that the conviction was bad, there being evidently no intention of causing grievous hurt, or any knowledge that such hurt was likely to be caused; indeed, except for peculiar circumstances, no mischief would have resulted at all, and the matter would have been diminished to a case of simple assault.

Under the circumstances, therefore, and considering the provocation received by the prisoners, and the very slight nature of the actual wound inflicted by them, a sentence of six months' rigorous imprisonment would, I think, be amply sufficient to meet the

requirements of justice, and I would amend the sentence accordingly.

The papers must go before a second Judge.

Loch, J. I agree with my colleague, and think that, under the circumstances, the sentence may be reduced to six months.

The 7th November 1865.

Present :

The Hon'ble F. A. Glover, *Puisne Judge.*

Evidence—Criminal Breach of Trust—Dishonestly receiving stolen property.

Queen versus J. J. Reghiline.

Committed by the Magistrate, and tried by the Officiating Additional Sessions Judge of Hooghly, on a charge of dishonestly receiving stolen property with guilty knowledge.

A prisoner, acquitted of criminal breach of trust, may, on the same evidence, be convicted of dishonestly receiving stolen property.

The prisoner in this case appeals against the finding of the Jury on four grounds.

The first two are that, having been acquitted of the criminal breach of trust, under Sections 407 and 408 of the Penal Code, he could not, on the same evidence, be convicted under Section 411 of dishonestly receiving stolen property.

The third is a general assertion of illegality, and the fourth a similar assertion of the petitioner's innocence of the offence of which he has been found guilty.

There is evidently no ground for the Court's interference in this case. The Jury were perfectly justified in convicting on the third count, although they held the evidence on which they found the prisoner guilty insufficient to support a conviction of criminal breach of trust. The offences were entirely distinct, and acquittal on the one charge could not possibly involve acquittal on the other.

For the rest, no specific allegation is made of any illegality in the Judge's charge, or in the finding of the Jury itself; and I am unable, after a careful perusal, to discover any. The evidence seems to me to have been fully and fairly laid before the Jury; and, with reference to the count on which the prisoner has been convicted, they were told first to be satisfied as to the identity of the guitars with those stolen from Messrs.

Vol. IV. Harold and Co., and afterwards to find whether the prisoner was in possession of them, knowing or having reason to believe that the articles had been stolen.

The question was one of fact, of which the Jury were the sole judges, and there is, therefore, no ground for the present appeal.

The 8th November 1865.

Present:

The Hon.ble F. A. Glover, *Puisne Judge.*

Defamation—Good faith—Onus probandi—Act XVIII. of 1862—Exception 9, Section 499, Penal Code.

Mr. Sealy *versus* Ramnarain Bose.

Committed by the Magistrate, and tried by the Sessions Judge of Moorshedabad, on a charge of defamation.

Act XVIII. of 1862 refers only to the High Court in its original criminal jurisdiction, and is not applicable to Mofussil Courts. Section 27 of that Act requires proof of the existence of the circumstances relied on as a defence, before good faith can be presumed in a case of defamation. The onus of proving good faith is on the person making the imputation. Before such person can claim the benefit of Exception 9, Section 499 of the Penal Code, he must show that he has exercised due care and caution.

This is a special appeal from the orders of the Sessions Judge of Moorshedabad, confirming the sentence of three months' imprisonment passed on Ramnarain Bose for defamation under Section 499 of the Penal Code.

Four exceptions are taken to the Judge's decision: The *first* is that *bond fides* on the part of the appellant ought to have been presumed in accordance with Section 27, Act XVIII. of 1862, and that in any case it was not for the appellant to prove the *bond fides* of his communication, but for the prosecutor to prove that it was made *malà fide*.

With regard to this, I observe that the Act above quoted refers only to the High Court in its original criminal jurisdiction, and is not applicable to Mofussil Courts. But, even were it otherwise, I do not see that the appellant's case would be in any way bettered, inasmuch as Section 27 requires that the circumstances are to be proved, and this is just what the appellant has failed to do in the present case.

As to the *onus* of proving *bond fides*, it was, I apprehend, clearly on the person making the imputation. That person was, in the words of the law, bound to show that the imputation was made after due care and caution. Now, in the present case, as the

charge against the sub-conductor was the result of a personal communication alleged to have been made to the appellant, the only possible meaning attachable to the words "due care and caution" would be that the party complaining could prove the imputation true; and, before the appellant can claim the benefit of Exception 9, he must show that he has exercised due care and caution—in other words, that the sub-conductor did actually demand the bribe as stated.

These remarks apply equally to the *second* objection. The *third* is that the Judge ought to have looked to the "*animus*" of the party making the imputation.

This objection appears to me worthless. The whole tenor of the appellant's letter to his principal is to the effect that the sub-conductor was putting difficulties in the contractor's way, and had caused good stores to be rejected as bad, because appellant had not agreed to pay him a certain consideration. The "*intention*," which is the essence of all cases of defamation, is clear enough. The object was to throw discredit on Mr. Sealy's probity, and to make out that, through his interference, really good stores had been rejected as bad.

And, as to the appellant's letter being a mere private communication not intended for publication, or to go beyond the control of the addressee, the contrary intention is patent on the face of it. Unless to give the contractor a means of impugning Mr. Sealy's conduct, the letter was altogether objectless, and the immediate use made of the communication by Essan Chunder shows that he (Essan Chunder) considered the letter as sent to him for that particular purpose. Had the letter contained a specific request that no use should be made of it, it would have been a different thing; but, so far from that, the appellant endeavoured to justify his statements, and produced witnesses to swear to the sub-conductor's demand of a bribe.

The *fourth* objection is unintelligible. The Judge did look into all the evidence as shown by his decision, and, finding that there was no proof of justification, held that the defamation was not protected by the Exception. His decision on this point is one of fact on evidence with which this Court cannot interfere in special appeal.

No point of law is, in my opinion, made out against the Lower Appellate Court's decision, and I therefore reject this appeal.

The 8th November 1865.

Present

The Hon'ble G. Loch and F. A. Glover,

Puisne Judges

Abetment.

Queen *versus* Jeetoo Chowdhry and others.

*Committed by the Magistrate, and tried by the
Officiating Sessions Judge of East Burdwan,
on a charge of causing grievous hurt*

Persons punished as principals cannot also be punished for abetment of the same offence.

Glover, J.—No point of law is taken in the prisoners' petition of appeal: their objections are directed solely to the finding of the Jury on the evidence.

This evidence appears to have been very fully and clearly laid before the Jury by the Sessions Judge, and on it they found the prisoners *guilty*. It is nowhere alleged that the Sessions Judge misdirected the Jury, or that any evidence was improperly admitted. So far, therefore, there is no ground of appeal.

But I observe that the prisoners have been convicted, *first*, of causing grievous hurt &c., under Section 326 of the Indian Penal Code (5th count), and *secondly* (6th count) of abetting the commission of that crime. This is an illegal finding, inasmuch as the Jury held all the prisoners to have been present, and to have taken an active part in the attack; they were, therefore, all principals, and, having been punished as such by the Sessions Judge, could not be punished over again as abettors, abettors being, in the words of the law, parties who do not themselves act, but procure or instigate others to put in execution their criminal intentions.

The sentence of one year's additional rigorous imprisonment passed on the prisoners under the sixth head of the charge should, therefore, be cancelled.

The same remarks apply to the Sessions Judge's order on the 8th count. The prisoners have been punished under the 7th count for rioting, &c. (Section 148 of the Indian Penal Code), and under the 8th for abetting the same offence. The extra punishment awarded for the latter crime should be remitted.

The papers must go before another Judge.

Loch, J.—I concur with Mr. Justice Glover in remitting the sentence of one year's imprisonment on the 6th and 8th counts of the charge; parties punished as principals cannot also be punished for abetment.

The 10th November 1865.

Present.

The Hon'ble G. Loch and F. A. Glover,
Puisne Judges

Murder—Culpable Homicide not amounting to Murder—Grievous Hurt—Want of intention or knowledge.

Queen *versus* Bhadoo Poramanick.

*Committed by the Magistrate, and tried by the
Sessions Judge of Rajshahye, on a charge of
murder.*

The offences of murder and of culpable homicide not amounting to murder, each suppose an intention or knowledge of likelihood of the causing death. In the absence of such intention or knowledge, the offence committed may be the offence of causing grievous hurt.

Glover, J. THE Sessions Judge has neglected to conform to the procedure laid down in Section 382 of the Code of Criminal Procedure, his attention will be drawn to the omission.

With regard to the case itself, I consider it proved by the evidence, and by the prisoner's own confession before the Magistrate, that he killed his wife.

But the Sessions Judge has convicted him (agreeing with one of the assessors) of culpable homicide not amounting to murder, on the ground that he had no intention of killing his wife. I assume this to be the ground of conviction, inasmuch as the Sessions Judge has endorsed the opinion of the assessor, which proceeds on the want of intention, without any remarks of his own.

This being so, the conviction is clearly wrong. Culpable homicide is not diminished to culpable homicide not amounting to murder, merely by the want of intention. Both of these crimes suppose that death was caused intentionally, and it is the presence of certain other exculpatory circumstances noted in the Exceptions to Section 300, Indian Penal Code, that makes the latter offence less heinous than the former. "Want of intention," under which phrase I include the wordings of all the four Clauses of Section 300, would take the crime out of the category of *culpable* homicide altogether.

Vol. IV. As I agree with the Sessions Judge that there was no intention on the part of the prisoner to take his wife's life, or any knowledge that death was a likely or probable result, his offence amounts to what in English law is termed man-slaughter, and is referable, according to rulings of this Court in similar cases, to Section 325 of the Indian Penal Code. Taking this view of the case, I would convict the prisoner under Section 325, and sentence him to five years' rigorous imprisonment. The case must go before another Judge.

Loch, J.—I concur with my colleague in thinking that the finding in this case is incorrect, on the grounds given by the assessor, and adopted by the Sessions Judge without remark. Section 299, Penal Code, describes the nature of culpable homicide. The offence comprehends *intention* of causing death, or of causing such bodily injury as is likely to cause death. Culpable homicide, as described in Section 300 (and the definition of the offence in the two Sections differs very little—it is somewhat amplified in the latter) is declared to be murder, unless the act be accompanied by one or other of the five Exceptions mentioned in that Section.

Now, there is no such Exception among these five "as want of intention," so as to make the offence culpable homicide not amounting to murder. The causes which reduce murder to culpable homicide not amounting to murder are, as given in Section 300, "grave and sudden provocation"—"self-defence"—"when committed by a public servant, or in aiding a public servant, in the course of his duty when done in good faith, and believed to be necessary for the due discharge of his duty"—"when committed in a sudden fight, in the heat of passion upon a sudden quarrel"—"when the person who suffers death, being above eighteen years, suffers with his own consent."

In all these Exceptions, certainly in the four first, there may be an intention to cause death; but, owing to the peculiar circumstances of each case, if death ensue, the higher crime of murder is not imputed to the offender. But, if none of these Exceptions arise, then, if there be intention, the offender has committed murder; or, in the absence of intention to kill, he has committed the offence of causing grievous hurt.

The finding, therefore, in this case should have been for grievous hurt in the absence of all intention to kill. The Penal Code has not provided for cases of simple man-slaughter. It declares what is culpable

homicide; how culpable homicide is murder, except under certain Exceptions; and it provides for other cases of homicide where there has been no intention to cause death, and which do not come within the definition of culpable homicide, under the head of grievous hurt (Section 325, Penal Code).

Had the Assessors and Sessions Judge found in this case that the culpable homicide was committed under grave and sudden provocation caused by the insulting words of the wife to her husband, the finding come to would have been correct. But this finding was incorrect on the ground of absence of intention to kill, or of knowledge that he was likely to kill. In the absence of such intention or knowledge, the finding should have been for grievous hurt.

As the provocation appears to have been great, and the prisoner was greatly irritated, after much forbearance, by the words of his wife expressive of her hatred to his person, and he appears only to have struck her twice when interrupted by his neighbours, I think five years' rigorous imprisonment will be a sufficient punishment for him.

The 11th November 1865.

Present:

The Hon'ble G. Loch and F. A. Glover,
Puisne Judges.

False Evidence—Solemn Affirmation.

Queen versus Munwar Khan, Appellant.

Committed by the Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of giving false evidence.

A charge of perjury held unproved, without proof that the statement on which it was founded was given on solemn affirmation under Act V. of 1840, instead of on oath.

Glover, J.—THE Sessions Judge has recorded no evidence to prove that the prisoner's statement before the Moonsiff was given on solemn affirmation under Act V. of 1840.

Until that is done, the case against the prisoner is incomplete, and the charge of perjury unproved.

Let the case be sent back to him, with directions to take the evidence of the person or persons who administered the solemn affirmation taken instead of an oath to the prisoner in the civil suit, and then to take a fresh defence from the prisoner in the usual way.

Loch, J.—I concur.

The 20th November 1865.

Present :

The Hon'ble F. B. Kemp, *Puisne Judge.*

**Forgery—Charge of fraud—Enquiry into,
by Small Cause Court Judge.**

Queen versus Dinonath Gangooly.

*Committed by the Magistrate, and tried by the
Officiating Sessions Judge of Nuddea, on a
charge of forgery.*

A Judge of a Small Cause Court may enquire into a charge that a decree was passed by his predecessor in the plaintiff's favor without the plaintiff's knowledge, and on a forged document.

This is a trial with a Jury, who have convicted the prisoner under Sections 466 and 467 of the Indian Penal Code.

The pleader for the prisoner contends that some of the witnesses for the defence, amongst them Mr. N. Thomson, the late Judge of the Small Cause Court at Nuddea, have not been examined; that the present Small Cause Court Judge was wrong in law in admitting a review of a case which had been decided some years ago, inasmuch as the decision was final under the provisions of Section 12, Act XLII. of 1860; that evidence to the effect that the plaintiff had executed his decree, and recovered under it by sale of the defendant's cattle, has not been taken into consideration; and, lastly, that, as the offences of which the prisoner has been found guilty are parts of one and the same offence, one sentence was sufficient, and that no cumulative punishment could legally be awarded.

I do not find that Mr. Thomson was named as a witness by the prisoner when questioned by the Magistrate under Section 227 of the Code of Criminal Procedure, previous to his commitment; nor do I think that the ends of justice require that the said official should be called.

The present Judge of the Small Cause Court was competent to institute an enquiry into this case, the charge being that a decree had been passed without the cognizance of the plaintiff, and on a forged document. The limitation applying to applications for review does not preclude the Court from enquiring into charges of fraud.

There certainly is evidence to the effect that the cattle of the defendant were sold in satisfaction of the decree in the suit

which the plaintiff now wholly repudiates; **Vol. IV.** but this and the other evidence of the case was left to the Jury, and does not appear to have satisfied them. The whole of the evidence *pro* and *con* was carefully summed up.

With respect to the last objection, Section 71 of the Code of Criminal Procedure does not, in my opinion, apply; the offences of which the prisoner has been convicted are not cognate, but distinct offences, for which separate and distinct punishments may be awarded; and, taking into consideration the fact that the prisoner was acting in a fiduciary position as attorney for the plaintiff, and has been found guilty by a Jury of his countrymen of a bare-faced forgery, I do not think the sentence too severe.

Appeal rejected.

The 20th November 1865.

Present :

The Hon'ble G. Loch, F. B. Kemp, and F. A. Glover, *Puisne Judges.*

Bigamy.

Queen versus Enai Beebee.

*Committed by the Deputy Magistrate, and tried
by the Sessions Judge of Sylhet, on a charge
of bigamy.*

HELD by the majority of the Court that a woman, who does not use all reasonable means in her power to inform herself of the fact of her first husband's alleged demise, and contracts a second marriage within sixteen months after cohabitation with her first husband, without disclosing the fact of the former marriage to her second husband, is liable to enhanced punishment under Section 495, Penal Code.

Glover, J. This case was sent for by the Court under the provisions of Section 405 of the Code of Criminal Procedure.

The facts are undisputed, and the prisoner was rightly convicted under Section 494 of the Penal Code.

But, taking into consideration the circumstances of the case, and the long absences of the husband, the last one extending to sixteen months, I think that the sentence inflicted by the Sessions Judge might, with propriety, be reduced, and that simple imprisonment for six months will amply meet the requirements of justice.

The case must go before another Judge.

Loch, J.—I do not see any sufficient ground for the reduction of the sentence in this case. The prisoner, if the evidence of her husband is to be believed, and I see no

Vol. IV. ground for questioning it, contracted a second marriage within sixteen months of her husband's last visit to her. He was employed in one of the tea gardens at Cachar, and used to be absent for long periods. If the prisoner's statement, that her uncle came and told her that her husband was dead, were true, his friends would have known something about it. She herself, living, as was probable, in her husband's house, would be the first to communicate the intelligence to her husband's mother who was living with her, and there would have been the usual lamentations for the death of their relative. There is no evidence to prove any part of her story; and, further, she appears never to have disclosed these circumstances to the person with whom she contracted the second marriage, so that she is liable under Section 495 to enhanced punishment. This must go to a third Judge.

Kemp, J. I concur with Mr. Justice Loch. The prior marriage is admitted; the prisoner did not use such reasonable means as were within her power to inform herself of the fact of her first husband's alleged demise; she contracted a second marriage within sixteen months after cohabitation with her first husband, on the averment that she was told by her uncle that her first husband was dead.

Without attempting to inform herself of this fact, and, be it observed, her first husband's relations admittedly resided within easy distance from her place of residence, she contracts a second marriage, concealing all these facts from her second husband.

To such a woman I am not inclined to show any mercy.

The 21st November 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Puisne Judges.*

Land-Disputes—Omission of Magistrate to record proceeding—Boundary dispute.

Mr. Harvey *versus* Mr. Brice.

Referred under Section 434 of Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

The omission of a Magistrate to record a proceeding in a case of disputed possession of land is not a mere informality in procedure, but renders the whole of the Magistrate's proceedings illegal.

Where the dispute is as to a common boundary between two contiguous estates, the Magistrate, instead of

attaching the boundary land, should find for one party or the other, with reference to the point of possession.

READ a letter from the Sessions Judge of Patna, dated the 24th October 1865.

The proceedings of the Cantonment Magistrate, Major Lloyd, are illegal, inasmuch as he has neglected to record the proceeding, which the law makes imperative.

The words of Section 318 are that, "when-ever a Magistrate or other officer, exercising the powers of a Magistrate, shall be satisfied that a dispute, likely to induce a breach of the peace, exists concerning any land, premises, &c., he shall record a proceeding, stating the grounds of his being so satisfied." The omission of such a proceeding is not a mere informality in procedure which, if no substantial injustice were done, this Court might overlook.

The parties may have been, nay, one of them says he has been, precluded from adducing all his evidence by this very omission. We, therefore, quash the order of the Cantonment Magistrate.

We observe that the Cantonment Magistrate in a boundary dispute between two Europeans, near neighbours, has attached the property in dispute, which consists of a narrow strip of land, at present occupied by a hedge, and which is the common boundary between the two compounds of the aforesaid gentlemen. The Court think that this is not a satisfactory way of settling a petty dispute of this description, and that the Cantonment Magistrate should find for one party or the other on the evidence submitted to him with reference to the point of possession. With these remarks the papers are returned.

The 27th November 1865.

Present :

The Hon'ble F. B. Kemp, W. S. Seton-Karr, and G. Campbell, *Puisne Judges.*

Murder—Unlawful Assembly.

Queen *versus* Nazoo Fakir and others.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of murder.

Held by the majority that, where two members of an unlawful assembly use spears and deliberately pierce another man through the chest and abdomen, with the knowledge that death is likely to ensue, although without proof of any intention to cause death, all the

members of the unlawful assembly are jointly guilty of murder.

Selon-Karr, J.—THE facts in this case, which is one of those unfortunately rather common in the district of Backergunge, are very well brought out by the evidence for the prosecution, which is remarkably dispassionate and clear.

The servants of an auction-purchaser, Brindabun Chuckerbutty, had gone, as they had, it appears, been in the habit of doing, and taken up their abode in the house of certain ryots, witnesses Nos. 1 and 2, and had used it as a cutcherry. That this proceeding was somewhat against the will of the owners is quite clear; and it is also certain that the party of the auction-purchaser came armed, and prepared to encounter opposition. After they had been at this house for a couple of days, and had summoned ryots to settle for their rents, they got hold of one Moneerooddeen, prisoner No. 97. He, it seems, had a brother who must have given the alarm, whereupon the party of Boikunto Chowdry, owner of half the property, and *benamiee* purchaser of a *howala* tenure, came armed in two bodies from the east and west, whereupon the party of the auction-purchaser, though much smaller in number, turned out to resist, and the result was that one Gholam Arfin was speared in two places, and died of the wounds; other persons were carried off temporarily.

No conduct on the part of the auction-purchaser, in my opinion, at all justifies or palliates the conduct of the attacking party. The party attacked were in the house of a ryot, not perhaps by his free-will, but without violence; and certainly their occupancy of the house in question could never be termed, as is now argued, an unlawful assembly in the eye of the law. Nor, again, was there anything in their summoning Moneerooddeen for rents to justify the attacking party in coming to his rescue with deadly weapons. Moneerooddeen, who has been put on his trial, says that he was there to settle about his rents, and that, when the rioters came, he ran out of the house on to the plain. I have no doubt that this is perfectly true as far as he is concerned.

The question then is, what crime does the evidence, which is quite clear, and on which the pleader for the appellant actually relies, in reality support?

The Sessions Judge finds all the parties guilty of culpable homicide amounting to murder, because they must have known that murder was likely to ensue, and because it

was committed in prosecution of a common object.

I am inclined to think that justice may be satisfied, and due punishment awarded, without resorting to this extreme view, and with full reliance on the evidence.

The deceased was killed by two spear wounds, one in the chest, and the other in the stomach, inflicted by prisoner No. 96, and by another man Omar, who has not been apprehended. May we not fairly say, looking to the Civil Surgeon's report as to the depth and extent of the wounds, which are certainly severe, that this prisoner Fedra, No. 96, did the act with the knowledge that it was likely to cause death, but without any intention of causing death. In this view the offence would be reducible, as far as the other prisoners are concerned, to one punishable by less severity.

Not that I think a severe sentence is not called for. The Sessions Judge remarks that these sorts of cases are still common, though not so frequent as they were a few years back. They must be visited with a certain severity in order to deter others.

The ends of justice will, however, I hold, be satisfied if the conviction be altered under Section 304; and if, under that Section, the principal offender, prisoner No. 96, be still punished with transportation for life, and the rest, excepting Moneerooddeen, with rigorous imprisonment for ten years. They must have been well aware that death, or at least grievous hurt, would be the possible result of their violent attack on the cutcherry.

Moneerooddeen, prisoner No. 97, I would release altogether. He was at the cutcherry at the call of the complainants, and not of his own accord. There is nothing to show that he had knowledge of the attack, or that he joined or aided the party actively; all he did was to run out of the cutcherry when his own people came.

The papers must go to Mr. Justice Kemp.

Kemp, J.—I concur in acquitting the prisoner Moneerooddeen; it is very clear that he was sent for by the auction-purchaser's people to pay his rent. He does not appear to have done anything beyond prudently running away on the approach of the rioters.

With reference to the other prisoners, my learned colleague is of opinion that justice may be satisfied, and due punishment awarded, without resorting to the extreme

Vol. IV. view of the case taken by the Sessions Judge. "The deceased" (observes my colleague) "was killed by two spear wounds, one in the chest, and one in the stomach, inflicted by the prisoner No. 96, and by another man, Oomar, who has not been apprehended. May we not fairly say, looking to the Civil Surgeon's report as to the depth and extent of the wounds, which are certainly severe, that this prisoner Fedra, No. 96, did the act with the knowledge that it was likely to cause death, but without any intention to cause death." My learned colleague would alter the conviction to one of culpable homicide not amounting to murder under Section 304 of the Indian Penal Code, and sentence the principal offender, prisoner No. 96, to transportation for life, and the other prisoners to ten years' rigorous imprisonment.

I think that the conviction of the Sessions Judge should be upheld. The evidence discloses that the prisoners, in pursuance of a common and illegal object, attacked the temporary cutcherry of the auction-purchaser, Brindabun Chuckerbutty. The auction-purchaser's people were exercising a legal right, and, as long as they did nothing but collect the rents due from the tenantry, they were doing nothing contrary to law. The prisoners, the partisans of the former proprietor, Boikunto Chowdry, were the aggressors; they came from a distance, and deliberately attacked the auction-purchaser's people; they were armed with deadly weapons, such as spears and *soolfees*, and, in the riot which took place, one man on the side of the auction-purchaser was speared and carried off wounded and dying by the assailants.

The Civil Assistant Surgeon reports that the wounds were mortal; that they were very deep; and that two important *viscera* were severely injured.

Where two men use spears, and deliberately pierce another through the chest and abdomen, the intention to kill may, I submit, be fairly presumed, and my learned colleague admits that the acts were done with a knowledge that they were likely to cause death.

The offence committed by the prisoner No. 96, in prosecution of the common object of the unlawful assembly, became the offence of all. If the offence committed by prisoner No. 96 had been one wholly beside the common object of the unlawful assembly, I should have hesitated in applying the provisions of Section 149 of the Penal Code, but in this case it is clear that it was not so.

If people will join in an unlawful assembly, some of the members of which are armed with deadly weapons, and the object of which assembly is to eject, *vi et armis*, an auction-purchaser who is exercising his legal rights, they must take the consequences if violence be used by one or more members of that assembly.

Backergunge is notorious for these riots with murder, and a severe sentence is necessary. I would, therefore, as an example, confirm the conviction and sentence passed by the Sessions Judge. The papers must be sent to a third Judge.

Campbell, J.—In this case I think there can be no doubt that the persons who made an armed attack knew that homicide was a likely and probable result, and that, under Section 149, they are all jointly guilty of the homicide which occurred.

The only question then is, what was the character of that homicide? I am always inclined to construe the definition of murder strictly, and to give to a prisoner the benefit of anything which can, in any way, be construed to take the offence out of that very heinous class. I do not look on it that the Penal Code is, as the Sessions Judge seems to suppose, particularly severe in regard to such offences. Very high penalties are prescribed for murder which the Court has no power to reduce; but then, on the other hand, the definition confines murder to the worst cases. If it can be shown that there was any legal pretext of right of private defence (however insufficient to justify the extreme act of taking human life), or that there was any sudden provocation, or even that the offence was committed without premeditation in the heat of passion in a quarrel and fight, the homicide is not murder, but is reduced to an offence of lower degree. But, when these mitigating circumstances are absent, I cannot think that a man who runs a spear into another can be without the knowledge that he is likely to cause death; if so, the man who commits the offence, and, according to my view, all who are found with him, in the terms of Section 149, are guilty of murder.

In this case it is difficult to bring the offence within any of the exceptions. Mo-neeroodeen (acquitted by my colleagues) should have been examined as a witness instead of being tried; but in his defence he does not suggest that he was violently seized or confined, the contrary is evident from his statements. As to occupying the 'ryots'

houses, that had occurred two days before, it was too late to claim a right of defence, and the ryots do not suggest that they called the prisoners to their assistance. Then it seems pretty clear that the affair was not a quarrel, but an arranged attack. I hardly think that previous possession is sufficiently enquired into in these cases; and, if much depended on the point, looking to the armed manner of the auction-purchaser's entry (which, however, the result seems to justify), I might have hesitated to confirm an extreme sentence without some more minute enquiry to ascertain that the purchaser's people had not in any degree overstepped their legal rights in respect of possession. But, as I have said, nothing of the kind is apparent on the proceedings; and, even if there had been shown to be some such pretext of possession on the side of the defendants as to give some color to the argument technically, that the offence could be brought under the definition of culpable homicide only, the case would be, in my view, one of the worst possible cases of the kind; for, according to the prisoner's showing, Boikunto Chowdry was a fraudulent purchaser in a false name of rights already sold to the prosecutor; he had no legal or proper status, and he ought to have asserted any claim legally, and not by force. The case bears every appearance of preconcerted violence; the district is a turbulent one, which requires example; and, altogether for a gross culpable homicide, I should not, under all the circumstances upon the whole, have thought the sentence of transportation for life too severe. The appeal of the prisoners is dismissed.

The 28th November 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Puisne Judges.*

Culpable Homicide not amounting to Murder—
Intentional omission to give notice of an offence.

Queen versus Ram Ruchea Sing and others.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of murder.

Where the *corpus delicti* is not established, there can be no conviction for culpable homicide not amounting to murder, nor for intentional omission to give notice of an offence which has not been proved to have been committed.

Kemp, J.—The prisoners Ram Ruchea and Hulkora were committed on two charges:

1st, murder; *2nd*, culpable homicide not amounting to murder.

The other prisoners were committed under Section 202 of the Indian Penal Code.

I am not satisfied with the evidence in this case. The deceased Kataroo is said to have left his home on the morning of Saturday, the 4th of February, for Damroan, to purchase hemp. Nothing whatever is heard of him until the 6th of February, Monday, when one of his relations, while casually passing by the village of Araoon, where the prisoners reside, is said to have heard some boys of that village gossiping. It is alleged that the boys said: "The man who was killed was Kataroo, and he lives at Ratowlee." These boys *have not been examined*, and it does not appear that the aforesaid relation took any immediate action upon the information. On the morning of Thursday, the 8th of February, or on the fifth day after the deceased left his house, the same relation finds a body floating in shallow water; he examined this body, and identified it to be that of his missing relation, the aforesaid Kataroo. He then sends his son to inform the widow and brother of the deceased; but, before they arrive on the spot, he appears to have got hungry, and to have left the corpse. During the night of the 8th of February, the flesh of the body was devoured by wolves and jackals, but on the morning of the 9th of February, when the Superintendent of Police arrived on the spot, the relations identified the skeleton as that of Kataroo; they appear to have been mainly assisted in this identification by the unusual size of the feet. No *post mortem* examination was made; nor, indeed, was it practicable to make one. The cause of death is, therefore, unknown; the finding of the skeleton, which his relations depose to be that of Kataroo, is established; and that some suspicion that the deceased was killed fairly arises, may also be admitted.

The police, taking their cue from the alleged overheard conversation of the boys, proceeded to the village of Araoon, and there appear to have been successful (how, of course, is not shown) in eliciting from certain chowkeedars that a thief, name unknown, was severely beaten by the prisoners, Nos. 80 and 81, and others not apprehended; and that the other prisoners, putedars of the aforesaid village, though present, tried to dissuade the other prisoners from beating the thief!

The Sessions Judge, connecting the death of an unknown thief in the village of

Or. 33.

Vol. IV. Araoon with the finding of a body in the river Ganges, which is identified to be that of Kataroo, jumps to the conclusion that the thief was no other than Kataroo; that the prisoners exceeded the right of defence of property; and that they are, therefore, guilty of murder. The prisoner Koileshur is the son of the prisoner Moheshur: he is acquitted as probably acting under the influence of the father. The prisoners Moheshur and Ramoo are convicted under Section 202, inasmuch as it is said that they knew, or had reason to believe, that an offence had been committed, and intentionally omitted to give any information respecting that offence, which they were *legally bound* to give.

In this appeal I have to consider, *first*, whether the prisoners, Nos. 80 and 81, have been convicted on sufficient evidence of the offence of culpable homicide amounting to murder.

andly.—If their conviction be correct, were the other prisoners legally bound to give information respecting such offence.

After reading and carefully considering the evidence of the chowkeedars, which I observe is not corroborated by any independent evidence, I am of opinion that it cannot be relied upon. They none of them can tell us who the thief was, where he came from, and under what circumstances, or what became of him after the alleged beating; nor does the witness Janke chowkeedar explain why he gave no information after he was set at liberty. The *corpus delicti* not in my opinion being established, the prisoners Nos. 80 and 81 should be acquitted; and, as the prisoners Nos. 83 and 84 cannot be convicted of intentionally omitting to give information of an offence which has not been proved to have been committed, they also should be acquitted. The papers must be sent to my learned colleague, Mr. Justice Seton-Karr.

Seton-Karr, J.—I have no doubt about the release of the two prisoners convicted of the grave offence. Even admitting that the recognition of the deceased Kataroo was possible, which is very doubtful, there is, as my colleague remarks, nothing to show how he came by his death.

There is further literally no evidence, reliable or unreliable, to connect the dead body with the beating to death of an unknown

thief. The alleged statement of the two boys, who were never sent for and examined, is obviously worth nothing.

As regards the conviction of the other prisoners, under Section 202 of the Penal Code, for intentional omission to give information of an offence, I am of opinion that the conviction might have been sustained for not giving information to the police that some person, name unknown, had been violently beaten to death, supposing the evidence to this allegation to be credited.

The grave crime in this case is, however, not one of those included in the long list of offences which, under Section 138 of the Criminal Procedure Code, certain persons are bound to report.

But there is a law which might cover the conviction, *viz.*, the first portion of Section 2, Regulation VIII. of 1814, which is still unrepealed, only the latter part of the Section, relating to the punishment, having been repealed by Act XVII. of 1862. Under this law, which is still in force, a zemindar would be accountable for information of the "commission of murder," and this would bring him, if he neglected his duty, under the purview of Section 202 of the Penal Code, and I have no doubt that the conviction might have been sustainable under this last Section, and the other law quoted, even though the principal defendants had been on appeal acquitted of the murder of a certain distinct person, named Kataroo, for other full and sufficient reasons.

But the truth is that the evidence of the chowkeedars or persons who saw the beating did not show that any murder was really committed. The name of the thief was not known, his actual death is not sworn to, and nobody knows what became of him.

On the whole, then, I am prepared to arrive at the same conclusion as Mr. Justice Kemp. The case, too, is a very unsatisfactory one in many points, and so, even if we believe that an unknown thief was at all beaten, which admits of doubt, we have no evidence that he was killed; and, if there was no murder committed, there was nothing which the last two defendants were legally bound to report.

All the prisoners are released.

The 28th November 1865.

Present :

The Hon'ble W. S. Seton-Karr,

Puisne Judge.

Appeal (Petitions of)—Time for presenting.

Queen versus Sreemutty Surno.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of attempt to murder.

Petitions of appeal to the High Court must be *presented* within sixty days.

This is the third case to-day in which I find that the appeal was presented beyond time. The jail darogah's endorsement bears date the 9th of October, or more than two months after the trial. The date of writing the petition is certainly the 27th of September; but the law (Section 415) says that petitions must be *presented* within sixty days, and the petition should thus have been presented to the High Court, or to the District Court, within that time, or, at any rate, filed before some authority or other, within sixty days.

The case, besides, seems a perfectly clear one.

Appeal rejected.

The 5th December 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Puisne Judges.*

Adultery (Compounding of)—Proof of Marriage of Woman—Charge by Husband.

Queen versus G. R. Smith.

Committed by the Magistrate, and tried by the Sessions Judge of the 24-Pergunnahs, on a charge of adultery.

The offence of adultery may be compounded.

In proceedings founded on a charge of adultery, strict proof is necessary of the marriage of the woman with whom adultery is alleged, and the charge should be instituted by the husband of the woman.

Kemp, J.—THE prisoner has been convicted of adultery under Section 497—Sentence, one year's rigorous imprisonment. Vol. IV,

This conviction cannot stand, for there is no proof of the marriage of the woman with whom it is alleged that the prisoner had sexual intercourse. In proceedings founded on a charge of adultery, strict proof of a marriage is always required.

There is also another flaw in this case. The charge has not been instituted by the "ostensible" husband of the woman (Section 177, Code of Criminal Procedure); on the contrary, he formally withdrew his charge, and intimated that he had received full atonement from the prisoner.

The offence of adultery may be compounded (*see* Illustration D, Section 214 of the Indian Penal Code).

I would acquit the prisoner. The papers must be laid before Mr. Justice Seton-Karr.

Seton-Karr, J.—I concur with Mr. Justice Kemp.

In my opinion there has been a most needless exposure, and a most unnecessary trial. The offence of adultery, even admitting that it had been committed in this case, is expressly mentioned as one which may be compounded (*see* the Illustrations to Section 214 of the Penal Code).

Looking to the situation of the parties, to the time and manner of the alleged offence, to the formal withdrawal of the complaint in the Magistrate's Court by the husband, who said that the accused had given him ample atonement, and to all the circumstances, I think the Sessions Judge should not have brought on the trial as he did; no gain to public justice or public morality was to be expected from thus forcing the parties into Court, but the very reverse.

It may be quite true that the final disposal of this case did not rest with the Magistrate; but, as the person said to be injured wished to withdraw the charge, he should have been permitted to do so.

The prisoner is released.

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The 5th December 1865.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Puisne Judges.*

Culpable Homicide not amounting to Murder.

Queen versus Soumber Gwala and others.

Committed by the Magistrate, and tried by the Sessions Judge of Behar, on a charge of culpable homicide not amounting to murder.

The Judge having convicted the prisoners of culpable homicide not amounting to murder, after having found that the act by which death was caused was undoubtedly done with the intention of causing such bodily injury as was likely to cause death, the conviction was quashed as illegal, because inconsistent with the finding, and a new trial ordered.

Kemp, J.—THESE three prisoners, of the *aher* or cow-herd caste, have been convicted by the Sessions Judge of Behar of the offence of culpable homicide not amounting to murder—Sentence, ten years' rigorous imprisonment, commuted to transportation under Section 59 of the Indian Penal Code.

The Sessions Judge observes that the offence committed by the prisoners is culpable homicide not amounting to murder, "*the act by which death was caused having undoubtedly been done with the 'intention' of causing such bodily injury as was likely to cause death.*" Now, on the face of this finding, the Sessions Judge convicts the prisoners of culpable homicide not amounting to murder, I cannot understand. Taking the Sessions Judge's own account of the case, it is clear that the prisoners allowed their cattle to trespass on the deceased's field; he very naturally remonstrated, and was abused for his pains, the prisoners tauntingly telling him that they would test the watch he kept over his crop at another opportunity. At night, while the deceased was asleep on a raised platform in his field, the prisoners and others, without a word, attacked him

with heavy sticks, and cruelly mauled him. On his saying that he knew them, they again set upon him. The man died from the effects of these injuries. The medical officer deposes that the body of the deceased was covered with lacerated and contused wounds. All these facts the Sessions Judge fully admits, and he describes the beating as "shameful," and yet he convicts of culpable homicide not amounting to murder.

There are no circumstances showing that the prisoners received any provocation; on the contrary, premeditation may be fairly presumed from their acts and conduct. In short, there is no extenuating circumstance, nothing to bring the offence within any one of the exceptions which reduce their crime from murder to culpable homicide not amounting to murder. The finding and sentence of the Sessions Judge do not meet the offence of which the prisoners have been guilty, and the conviction is illegal.

As a Court of Revision, I would direct that a new trial take place. The indictment must be amended, and the prisoners must be called upon to plead to the graver offence of "murder" under Section 302 of the Indian Penal Code. The accused *may be permitted* to recall and examine any witnesses for the prosecution who may have been examined in the first trial; after this is done, the Sessions Judge will pass a legal sentence.

The papers must be laid before Mr. Justice Seton-Karr.

Seton-Karr, J.—I concur; the prisoners, being the aggressors, go away at 4 P.M., and return six hours after 10 P.M. or so, and deliberately set upon the deceased.

There can be no pretence of want of premeditation, heat of passion, or sudden quarrel, so as to bring the charge down to less than murder. What the evidence discloses is murder, and nothing less.

The prisoners must be called on to plead to the graver charge, and I think, under Section 405 of the Criminal Procedure Code, that we ought to order a new trial, and that all the witnesses should be re-examined.

The late trial is quashed.

The 14th December 1865.

Present :

The Hon'ble F. B. Kemp, W. S. Seton-Karr,
and L. S. Jackson, *Puisne Judges.*

Murder.

Queen versus Pooshoo and Haurriah.

*Committed by the Officiating Joint Magistrate,
and tried by the Sessions Judge of Rungpore,
on a charge of culpable homicide not amounting
to murder.*

HELD by the majority that, when four men beat another at intervals, and so severely that death ensues from the injuries received, they must be presumed to have known that by such acts they were likely to cause death; that, moreover, when these acts were done when there was no grave or sudden provocation, or no sudden fight or quarrel, the offence which they have committed is murder; and that the offence of murder is not reduced to culpable homicide not amounting to murder by the absence of intention to cause death.

Seton-Karr, J. I cannot term this case a very satisfactory one, and most certainly cannot affirm the conviction for culpable homicide not amounting to murder.

That the deceased Boodhoo was beaten by the prisoners seems, however, clear, for two of the prisoners admit having assaulted the deceased. But the cause of the attack does not appear very clearly made out.

There is no evidence to any criminal intrigue between Phoolmonee, the wife of the prisoner Saifoollah, and the deceased Boodhoo.

Boodhoo, the deceased, and Pooshoo, who, strange to say, is one of the assaulting prisoners, had, it is said, taken the woman Phoolmonee away, and Boodhoo, it would seem, had joined him when in her company. This at least is the wife's story, who says, however, that Pooshoo was merely going to escort her to her mother's house.

Then Boodhoo, it would seem by some of the accounts, had, on the night when he met his death, gone to the house of Saifoollah, where either Pooshoo taxed Boodhoo with giving him a bad name, or Boodhoo made the same charge against Saifoollah.

However this may be, the witnesses all say that the four prisoners beat the deceased with their hands, or with a ruler, or a baton, yet, in spite of this, we are told that the prisoners appeared to have regretted what they had done, to have offered Boodhoo some rice to eat, and then to have escorted him home. On his way home, he appears suddenly to have become faint and unable to walk, when Saifoollah, the prisoner No. 103, is said to have taken him on his back, and to have got him near home, where his body was found the next day.

The cause of death is stated by the native doctor to have been congestion of the membranes of the brain, caused, in all probability, by a blow. The muscles of the back too are stated to have been "unnaturally congested, apparently by blows from the fist." I would not be inclined to lay very much stress on this evidence, except as showing that death was probably due to violence.

This account tallies with the evidence for the assault, but I do not think that we can fairly say, on this evidence, that the prisoners used violence with the knowledge that it was likely to cause, but without any intention to cause, death.

Death was not, it appears to me, within the knowledge of the prisoners, nor was it the natural or even probable consequence of their acts. If they left off beating the man, and offered him rice which he refused, and if he was then able to walk some part of the way home, I do not think that the latter part of Section 304, above quoted, can legally apply. I would alter the conviction to one for hurt under Section 323, and sentence to one year's rigorous imprisonment, and 100 rupees fine, or three months in addition, or it might be said that the offence falls within the category of grievous hurt, but beyond this I cannot go.

The gist of the offence, it seems to me, lies not so much in the violence of the beating as in the fact that *four men set upon one man*. But it seems to me quite impossible on the evidence to say legally that death was contemplated, or within the knowledge of any of the four assailants.

The papers must go to Mr. Justice Kemp.

Kemp, J. These four prisoners were committed on a charge of culpable homicide not amounting to murder. The Assessors and the Sessions Judge of Rungpore have convicted the prisoners of the said offence, and the sentence passed is five years' rigorous imprisonment on each prisoner.

My learned colleague would convict of "hurt," Section 323 of the Indian Penal Code, and the sentence proposed by him is one year's rigorous imprisonment, and a fine of 100 rupees; in default of payment, further imprisonment for three months.

I cannot concur. Saifoollah and Boodhoo are two brothers. The wife of the former, the witness Phoolmonee, appears to have left her husband's house in company with the deceased by name Boodhoo, and the prisoner Pooshoo. The woman was taken to the house of the maternal grandmother of the deceased, and some of her clothes were

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Vol. IV. taken with her. It is said that the woman was not treated well by her husband, and that she wished to visit her mother's house, but was prevented by her husband from doing so. At all events, there is no evidence of any criminal intrigue between the deceased and the wife of the prisoner Saifoollah.

The prisoner Pooshoo, it appears, was unable to keep the fact of the abduction of the woman quiet, but began to talk about it in the market-places. This led to the discovery of the woman, and she was taken back to her husband's house. Pooshoo and the deceased went, or were called, to the house of the prisoners Saifoollah and Boodhoo. Pooshoo appears to have taken the part of the injured husband, and to have accused the deceased of getting him a bad name by accusing him of the abduction of the woman; the deceased recriminated and accused Pooshoo. Be this as it may, it is well proved that the four prisoners, Saifoollah, Boodhoo, Pooshoo, and Haurriah, set upon the deceased, and cruelly beat him with their fists and with a baton, and a wooden *kurum* or patten. When they found that they had gone too far, they offered the deceased rice to eat; but, as may be well imagined, he was not in a state to accept of their offer. They then took the deceased with them, and were proceeding towards his house, when the deceased became faint and unable to walk. Upon this the prisoner Saifoollah took the deceased upon his back, and carried him to a place near the house of the witness Maree Bewah, where they left him in a *cuchoo* field; all this took place at night. The body of the deceased was found the next morning in this field. The police reported that there were marks of blows on the body from the abdomen upwards. The medical officer deposes that there was congestion of the membranes of the brain, caused in all probability by a blow; that the muscles of the back, of both sides of the chest, of the skull, and of the face, were unnaturally congested, apparently from blows with the fist; that the organs were healthy; and death was caused by violence.

It is clear that the deceased was cruelly beaten by the four prisoners, and that his death was caused by that beating. The evidence of the female inmates of the house of the prisoners Saifoollah and Boodhoo, and of the neighbours, proves this. When four men set upon another, and beat him unmercifully, and at intervals, it must, I think, be admitted that they must be presumed to have known that by such acts they were likely to

cause death, and this much the Sessions Judge admits, but he adds that the prisoners did not intend to cause death. Now, the offence of culpable homicide is not reduced to that of culpable homicide not amounting to murder by the absence of intention to cause death. There is, as observed by Mr. Justice Loch (in the case of the *Queen vs. Bhadoo Poramanick*; see *Sutherland's Weekly Reporter*, Vol. IV., No. 8, November 1865, page 24, Criminal Rulings), no such exception amongst the five Exceptions appended to Section 300 of the Indian Penal Code as "want of intention."

In this case, the acts of the prisoners show that they knew that they were likely to cause death; they have, therefore, committed the offence of culpable homicide as defined in Section 299 of the Indian Penal Code. There was no grave and sudden provocation, for the woman had returned home, and the husband Saifoollah says that he intended to complain to his zemindar; the expense appears to have deterred him from doing so. There was no sudden fight or quarrel, and the attack by four men upon an unarmed and elderly man was both cowardly and cruel. There is, therefore, really nothing to reduce the crime from culpable homicide amounting to murder to culpable homicide not amounting to murder.

Being of opinion that, on the evidence before the Court, the prisoners should have been convicted of murder, I would, acting as a Court of Revision, quash the trial and conviction, and direct the Sessions Judge to amend the indictment under Section 244 of the Code of Criminal Procedure. The prisoners must be arraigned on a charge of murder. After pleading to that graver charge, they may be permitted, if they require it, to examine the witnesses for the prosecution; on the completion of the trial, the Sessions Judge will pass a legal sentence.

The offence of "hurt" is thus described in the Penal Code: "Whatever causes bodily pain, disease, or infirmity to any person, is said to cause hurt." In the present case, four men beat another so severely that death ensues from the injuries received; such an offence is clearly something more than "hurt."

The papers must be sent to a third Judge. *Jackson, J.*—I concur in this view. The case appears to fall within the 2nd Clause of Section 300 of the Indian Penal Code.

Let the proceedings be quashed, and the record be returned to the Court of Session with directions as proposed by Mr. Justice Kemp.

The 16th December 1865.

Present :

The Hon'ble F. B. Kemp, L. S. Jackson, and
G. Campbell, *Puisne Judges.*

Murder.

Queen versus Sheikh Choollye.

*Committed by the Joint Magistrate of Monghyr,
and tried by the Sessions Judge of Bhagul-
pore, on a charge of murder.*

HELD by the majority (Campbell, J., dissenting) that, if a man strikes another on the head with a stick when he is asleep, and fractures his skull, knowledge of likelihood of causing death must be presumed; and that, if none of the Exceptions under Section 300 of the Penal Code are pleaded or probable, the offence committed is murder.

Campbell, J.—This is one of those cases which raise questions as regards the distinction between murder and offences of a secondary degree, which have not yet been very well settled under the Penal Code.

The assessors would convict of culpable homicide only; the Judge convicts of murder. I am always averse to construe too harshly the definition of murder, under which the hands of the Judge are, as it were, tied, and he must pass a very severe sentence, whatever the circumstances of the particular case. Wherever there is reasonable room for doubt, whether the offence comes under the *major* or *minor* class of criminal homicide, I would give the prisoner the benefit of the doubt, and *that* without defeating justice; for the Code enables the Judge to pass for culpable homicide every sentence from the lowest to the highest sort of death, according to the circumstances of the case; and, in doubtful cases, or such as fall near the line, death would never be inflicted even on a conviction for murder. In this instance, the Magistrate was certainly wrong in bluntly asserting, as a fact, that there was a sudden quarrel (that not being proved), and also in narrating the first quarrel and subsequent assault as if they were all one scene, instead of two separate scenes or acts separated by a distinct interval. On the other hand, the Judge seems to me to treat the case too much as if it were only *for the prosecution to prove the homicide*, and for the prisoner to prove an exception if he can, failing which he must be convicted of murder; and also scarcely sufficiently to draw the distinction between an act done with the intention of

causing such injury *as is in fact likely to cause death* (constituting culpable homicide), and the same offence with the addition of knowledge of the likelihood of death on the part of the offender, or a distinct intention to cause a specific bodily injury, such as in the ordinary course of nature must cause death, either of the two latter cases amounting to murder. As respects the exceptions, it seems to me that we cannot throw entirely on the prisoner the whole *onus* of proving the exceptions; that it is for the prosecution to make out a case of murder; that it is a homicide not coming within the exceptions; and that, if, without positive proof, the circumstances are such as not to shut out the hypothesis that one or other of the exceptions may have existed if all the facts had been known, and to render such a hypothesis not improbable, the prisoner may have the benefit of any reasonable doubt. Now, in this case, the Judge seems to discard the evidence of the old woman, with respect to the statements of the deceased, as not supported by the other witnesses, and not reliable. We are, therefore, in this situation, that we know nothing of the immediate origin of the assault. But the circumstances of the previous quarrel, and the relations of the parties, are not such as to have rendered it probable to the mind of the assessors that there was a wilful and premeditated attack. Possibly, therefore, the conjecture that there must have been a renewed and sudden quarrel may not be without foundation. Again, on the other point, there can be no doubt that, if the prisoner intended to fracture the skull of the deceased, and no sudden quarrel could be reasonably presumed, the Judge would be right in convicting him of murder. But was there any intention to fracture the skull, or inflict such other injury necessarily mortal in the ordinary course of nature? The assessors evidently think not, and it is important to see the nature of the weapon used. A man who uses a gun or a sword may be presumed to intend mortal injuries, or to know that they are likely to result. But a *lattee* is a wide world. It cannot be said that every blow given with every *lattee* is intended to inflict a mortal injury. The Magistrate distinctly states that the *lattee* was a "light" *lattee*, and, as the Judge does not say to the contrary, I must presume it to be so.

Here, then, are two men of low condition, with no serious or deep-rooted enmity, but, on the contrary, relations and neighbours, I may say *chums*. They have a quarrel about

Vol. IV. a petty matter, which, for the moment, subsides. The curtain drops, and they are left alone. When it is raised a little later, it is found that one of them has struck the other on the head with a light *lattee*, by which it turns out that the skull is fractured, and death after some time results. Setting aside the probability of a renewed sudden quarrel, it seems, on the whole, to me that, while the prisoner, who so used his *lattee*, intended to cause an injury of which death was not an improbable or unlikely result, and is therefore guilty of culpable homicide, there is room for doubt whether he either knew and felt at the time that death was likely to result, or had any real intention of fracturing the skull, or causing an injury mortal in the ordinary course of nature. On the whole, then, I would give the prisoner the benefit of these doubts, and would consider him guilty of culpable homicide only.

If that be so, seeing that the *lattee* was a light *lattee*, and the offence not of the very worst character of its kind; in fact, looking on the death as not so much a necessary as an unfortunate consequence of the prisoner's act in striking at the deceased, I would commute the sentence to ten years' transportation.

Jackson, J.—I regret that I cannot concur with my learned colleague.

It seems to me certainly the business of the prosecutor to prove the circumstances which ordinarily constitute, under Section 300 of the Indian Penal Code, the offence of murder, and for the prisoner to prove the circumstances, if any, of exceptions which take the case out of that category.

In this case the deceased and the prisoner, who were cousins, and lived in the same homestead, had a dispute with high words in the evening relative to a cattle-trespass, of which the circumstances are not clear, but, according to the prisoner's own statement, it was his cattle which had injured the deceased's crop.

Some hours later, when the other inmates were asleep, and the brother of the deceased was watching his own crops, an outcry is heard, the deceased is found with his skull fractured, a *lattee* on the ground, and the prisoner near at hand. The deceased at once, in presence of the prisoner, declares that the prisoner has inflicted the blow, and the wounded man dies of the injury within three days. The prisoner makes no defence, but the absurd statement that deceased had fallen upon his head.

The conclusion to which the evidence in

my opinion points is, that the prisoner struck the deceased as he lay sleeping in the verandah.

It does not need the heaviest description of *lattee* to fracture a man's skull with a blow as he lies sleeping.

I find it difficult to come to any other conclusion than that the prisoner intended to take life; that at least he had the intention of causing such bodily injury as was sufficient, in the ordinary course of nature, to cause death, appears to me unquestionable; and, as no circumstance of exception is pleaded or even probable, the prisoner has committed murder.

If the Judge had passed a sentence of death, I am not sure that I should have refused to confirm it. Let this go to a third Judge.

Kemp, J.—This case has been sent to me owing to a difference of opinion between my learned colleagues as to the grade of culpable homicide of which the prisoner has been guilty.

Mr. Justice Campbell would convict of culpable homicide not amounting to murder (Section 324, Indian Penal Code); Mr. Justice L. Jackson of culpable homicide amounting to murder (Section 302 of the same Code).

The Assessors were of opinion that "there is full proof that the prisoner Choollye struck the deceased with his *lattee*, but not with the object of killing him, only as a punishment;" for, as observed by the Assessors, "if he wished to kill him, he would have struck him more than one blow. Hence culpable homicide is proved."

The Sessions Judge finds on the evidence that the prisoner suddenly, and without any immediate provocation, struck the deceased a blow on the head with a stick (not a heavy one) which fractured his skull, and he died on the third day. The Judge is of opinion that the offence comes within the 3rd Clause of Section 300 of the Indian Penal Code, and that a blow which fractures the skull across transversely in two lines must be deemed to be sufficient in the ordinary course of nature to cause death. The Judge convicts of culpable homicide amounting to murder, and sentences the prisoner to transportation for life.

The prisoner and the deceased were cousins living in the same homestead. It appears that, on the evening of the murder, the two had high words in the matter of a cattle trespass—a frequent source of disputes amongst the agricultural community. The prisoner appears to have been in the wrong. At night, when the deceased was asleep, and, as far as the evidence shows, without a renewal of the quarrel, nor under provocation, the prisoner struck the deceased with a *lattee* on the temples. The Civil Surgeon deposes that there were two fractures running parallel to each other; that there was a large effusion of blood on the brain, which was the cause of death. The surgeon further says that the stick produced in Court, which is described as having a *knob at the end*, was a weapon with which the injuries he observed might have been inflicted.

The prisoner pleads *not guilty*. He does not raise the plea of provocation; nor does he seek to extenuate his crime by urging any of the mitigating exceptions which under the Code would lead to reduce his offence to culpable homicide not amounting to murder: had he done so, the *onus* of proving such mitigating circumstances would most undoubtedly have been upon him. But he simply denies, and avers that the deceased fell down on his head, and thus he met his death—a story which is most improbable, and wholly unsupported by any evidence.

As to the offence of which the prisoner on the evidence has been guilty. When a man strikes another on the head with a stick, when the other is asleep, and consequently helpless, and fractures his skull in two places, I think it may be fairly said that the act was done with a knowledge that it was likely to cause death; such act, therefore, comes within the definition of culpable homicide as laid down in Section 299 of the Indian Penal Code. The next question is whether such act comes up to the definition of culpable homicide amounting to murder as laid down in Section 300? I think that it does; for the act was clearly done with the intention of causing such bodily injury as was sufficient in the ordinary course of nature to cause death.

None of the exceptions appended to Section 300, which would take the offence out of the category of murder, exist in this case, nor are any pleaded. Finding, therefore, that the prisoner is guilty of the offence of murder, I concur with Mr. Justice Louis Jackson. The sentence passed by the Sessions Judge is confirmed, and the appeal dismissed.

The 21st December 1865.

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Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Puisne Judges*.

Abetment—Errors in proceedings—Appellate Court (Powers of).

Queen versus Ramnarain Josh and others.

Committed by the Magistrate, and tried by the Sessions Judge of East Burdwan, on a charge of grievous hurt.

Held that the prisoners could not be convicted of abetment of grievous hurt, and of abetment of riot, after having been convicted of both charges as principals. As, however, the evidence credited by the Jury was held by the High Court to support a conviction of culpable homicide, and as the prisoners, even on their conviction on the lesser charge of grievous hurt, might have been sentenced to a much heavier punishment than had been passed on them, their punishment was not reduced.

We have heard the arguments of Mr. Paul against the conviction of the prisoners in this case. They have been sentenced by the Judge of Burdwan to periods of imprisonment, aggregating from nine to five years, on four counts, *viz.*, for grievous hurt, and for rioting, armed with deadly weapons, as well as for abetment of both these offences.

Mr. Paul contended that his clients had been acquitted of the graver charges of murder and culpable homicide not amounting to murder; and he urged that there was no evidence to sustain the convictions on the charges mentioned above. He also pressed it on us that certain of the prisoners, Mooktaram and Khetra, had been convicted of grievous hurt, although they were grievously wounded themselves.

Mr. Paul also contended that there had been a misdirection on the part of the Judge as regards the count of riot, in saying that the "riot was admitted by both parties;" and he further contended that, as the Jury did not find which party was the aggressor, and which version was true, there was literally no evidence for the conviction on the seventh count, *viz.*, that for rioting, for the evidence on either side was to the effect that the opposite party was the aggressor, and not that a mutual stand-up fight had taken place. This being discredited, no other evidence remained.

We have given these arguments, which were plausibly and ingeniously urged and at some length, every attention, but we are unable to recognise their validity as entitling the appellants either to their acquittal or to any mitigation of punishment.

Vol. IV. If the evidence, as laid before the Jury, was believed, as it certainly was believed, there was ample ground for conviction of the higher offence, and the appellants have been very fortunate in being convicted only of grievous hurt and rioting; other men were grievously wounded, and one was killed, besides the two persons alluded to by Mr. Paul, and there were sufficient grounds for the jurymen to believe that the affray originated not exactly in the manner described by either party: at any rate the Judge very fairly presented this part of the case to them, and told them that they might believe either or neither version as they thought fit, and that they might accept a third version of the origin of the affray.

In charging the Jury on the next count, the Judge, no doubt, meant that the actual fact of the affray was admitted by either party, though each endeavoured to make out that his adversaries were the aggressors. The Judge's charge is extremely full, lucid, and dispassionate, and we cannot avoid the conclusion that everything was properly put to the jury, and that they were fairly constituted judges of the credibility of the evidence.

The appellants, we however think, should not have been convicted of abetment of grievous hurt, and of abetment of riot, after they had been convicted on both charges as principals; but it remains to be seen whether their punishment should be reduced on this account.

Looking to Section 426 of the Criminal Procedure Code, we do not think any such reduction called for. In our view of the case, the evidence credited by the Jury would support a conviction of culpable homicide. The prisoners, even on conviction on the lesser charge of grievous hurt, under Section 326 of the Penal Code, might have been sentenced to a much heavier punishment than what has been passed on them. In our opinion, "the accused person ought on the evidence to have been found guilty" (Section 426 of the Criminal Procedure Code) of a heavier offence, and they have not been "sentenced to a larger amount of punishment

than could have been awarded" for that offence. On the contrary, looking to the character of the affray, the appellants, to our thinking, have been very lightly dealt with, and have no claim to any mitigation. It is true that, on the substantial offence of rioting under Section 148, they could only have been sentenced to three years' imprisonment. But the charge of grievous hurt, and the conviction thereon, would, as observed, cover much more than nine years, which is the *maximum* awarded to any one batch of the appellants.

This point, and this Section 426, do not appear to have been noticed by the Court on the last occasion when this case was before them.

We see no reason for any interference, and reject all the appeals.

The 22nd December 1865.

Present :

The Hon'ble F. B. Kemp, *Puisne Judge.*

Culpable Homicide not amounting to Murder.

Queen versus Kasseemoddeen, Kurreemoddeen, and Resimuddeen.

Committed by the Officiating Joint Magistrate, and tried by the Sessions Judge of Tipperah, on a charge of murder, &c.

Intriguing with a sister is sufficient grave provocation to justify a conviction of culpable homicide not amounting to murder as against the brothers who, finding the deceased lying with their sister in the same bed, ill-treated him, from the effects of which ill-treatment he died.

The prisoners are three brothers. The deceased had an intrigue with their sister, the witness Paunubee. The brothers found the deceased lying with their sister on the same bedding, and, seizing him, dragged him from the bed, and ill-treated him, from the effects of which ill-treatment he died: the provocation was grave. I concur with the Sessions Judge in convicting the prisoners of culpable homicide not amounting to murder, and I am not disposed to interfere with the sentence.

Appeal rejected.

The 5th December 1857.

Present :

Lord Wensleydale, T. P. Leigh, Sir E. Ryan,
and Sir W. H. Maule.

Supreme Court of Calcutta (Criminal jurisdiction of)—9 Geo. IV., c. 74, section 56 (Construction of)—Criminal offences committed in two places—Limits of the E. I. Co.'s Charter.

On Appeal from the Supreme Court at Fort William.

Nga Hoong and others

versus

The Queen.

Section 55 of the Statute 9 Geo. IV., c. 74 (applying and extending to the British territories in India the provisions then recently made for England with respect to offences committed in two different places, or partially committed in one place, and accomplished in another), applies only to the cases of persons amenable to the Supreme Court at Calcutta beginning to commit offences in one place, which are afterwards completed in another, and not to a case where the persons committing the offence were not amenable to the said Court, and where the whole offence which has been committed was within one jurisdiction.

The term "within the limits of the Charter of the said United Company" construed to mean within the limits of the Trading Charter of the E. I. Co.

THEIR Lordships in this case have had an opportunity of consulting the arguments in the Court of Calcutta, which are ably and perspicuously stated by the Chief Justice and Mr. Justice Buller on one side, and by Mr. Justice Jackson on the other. They have heard as well every argument which could be advanced, either in favor of the conviction, or against it, at the Bar; and, having formed their conclusion, and entertaining no doubt upon the question, they think it would be improper to create any further delay for the purpose of considering this case. They are all quite satisfied that the judgment cannot be supported, and that the conviction was wrong.

The question in this case depends entirely upon the construction of the 9th of George the Fourth, chapter 74, and of the 56th Section of that Act, taken in conjunction

with the preamble. Now, there is nothing more clear than that, with respect to the criminal law, the construction is always to be strict; and, putting a strict construction upon the 56th Section of this Act, we have no doubt that it was not meant to apply to a case of this kind, but that, in the first place, it extends only to persons who were otherwise amenable to the criminal jurisdiction of the Court at Calcutta, who are the persons described in the 1st Section; and that, by the language of the Section in question, it applies only to cases in which the felony or crime has been committed, by persons who could commit that crime, partly within the jurisdiction, and partly without.

The object of the Statute, as appears by the recital, was for the purpose of applying and extending to the British territories in India the same provisions as had been recently made for England with respect to offences committed in two different places, or partially committed in one place, and accomplished in another, which provisions had been the subject of a recent enactment in the 9th of George the Fourth, chapter 31. The preamble describes that to have been the object of the Statute; and there can be no doubt that we must consider the preamble as a key to the construction of the Statute, though it would not, of course, control every provision; for we very often find that the subsequent provisions of a Statute extend beyond the limits of the preamble.

The Statute goes on to say that the object being that the "alterations should be extended to the British territories under the Government of the United Company of Merchants of England trading to the East Indies," it is, therefore, enacted that the Act "shall extend to all persons and all places, as well on land as on the high seas, over whom, or which, the criminal jurisdiction, of any of His Majesty's Courts of Justice, erected or to be erected within the British territories under the Government of the United Company, does, or shall hereafter, extend." Now, that Clause clearly shows that the object of the Statute was that it should apply to such persons. The Solicitor-General says that the word "extend" is not to be construed to confine it to such persons, and that it is not to limit the jurisdiction. But the word "extend" is to be explained by the preamble, which states the object of the Statute to be to extend the recent enactments of the Act which is in force to the East Indies, and the word "extend" is to be read the same as if it were "apply."

IV. Then we must consider whether the 56th Section applies merely to those persons, or whether, as the Chief Justice and Mr. Justice Buller have stated, it extends beyond the preamble, and applies to an offence completely committed within the limits of the Company's Trading Charter, but not within the limits of Calcutta. Now, reading that Clause, we think that there is really no difficulty in saying that the sole object of it was that it should apply to offences partially committed in one district and completed in another. The words of the Clause are: "That where any person being feloniously stricken, poisoned, or otherwise hurt"—the word "feloniously" seems to show that it was meant that, at the time when the person gave the original stroke, he was a person capable of committing felony—"at any place whatsoever, either upon the land or at sea, within the limits of the Charter of the said United Company, shall die of such stroke, poisoning, or hurt at any place without those limits; or being feloniously stricken, poisoned, or otherwise hurt at any place whatsoever, either upon land or at sea, shall die of such stroke, poisoning, or hurt, at any place within the limits aforesaid, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory before or after the fact to murder or manslaughter, may be dealt with, enquired of, tried, determined, and punished by any of His Majesty's Courts of Justice within the British territories under the Government of the said United Company, in the same manner in all respects as if such offence had been wholly committed within the jurisdiction of the Court, within the jurisdiction of which such offender shall be apprehended or be in custody."

One question raised before us by the learned Counsel for the appellants is as to the meaning of the term "within the limits of the Charter of the said United Company." On that point, I believe, their Lordships have not the slightest difficulty. Those words are to be construed in the same way as they are used in the Statute of the 26th of George the Third, to which this Statute forms an addition. They are to be construed to mean within the limits of the Trading Charter of the Company. So far, therefore, as regards the place of committing the offence, this was an offence committed within those limits, and the Court had in that respect jurisdiction. But the words of the Section do not apply to entire offences begun and com-

pleted within the jurisdiction, but to those partly committed within, and partly without which are put on the same footing as if they had been "wholly committed within the jurisdiction." It is perfectly clear that the term "wholly" shows the intention of the Legislature to be, that the Section shall apply only to that description of case; and it cannot have the sense of "actually committed" put upon it, as is contended on the part of the Crown, without doing violence to the words. Therefore, it appears to us, proceeding upon the ordinary rules of the construction of penal enactments that the object of this Section was merely to apply the improvement of law, which had lately taken place in England, to the case of persons, amenable to the Court of Justice at Calcutta, beginning to commit offences in one place, which were afterwards completed in another: that it does not apply at all to a case of this kind, where the persons committing the offence were not amenable to the Court of Calcutta, and where the whole offence which has been committed was within one jurisdiction.

The Court are confirmed in their opinion as to the meaning of the Statute, with respect to the persons to whom it is applicable, by the last Clause, the 127th Section. It is introduced at the end of this Statute obviously with the purpose of showing what class of persons were liable to the provisions of the Statute, and it extends the liability of persons to the jurisdiction of the Courts beyond what it had been before. That Section enacts: "That all persons, whether British subjects or others, employed by or in the service of His Majesty, shall be held subject and amenable to the criminal jurisdiction of His Majesty's Courts of Justice, erected or to be erected within the British territories under the Government of the said East India Company, in the same manner as persons employed by or in the service of the said United Company are now by law subject and amenable to the said jurisdiction. Before that Statute, British subjects properly designated as British subjects, that is, British-born subjects, and persons in the service of the East India Company, were liable to the jurisdiction of the Court of Calcutta; persons not in the employment of the East India Company, but in the employment of His Majesty, were not so liable. This Statute extends the liability to those who are servants of the Crown; and that provision, finding its place in this Act of Parliament, raises, in their Lordships' opinion, a strong

inference that the Statute was meant to apply to no other persons than those who were liable to the jurisdiction of the Court of Calcutta, to which the last Clause makes a considerable addition.

Therefore, looking at this Act of Parliament altogether, their Lordships have not any doubt what the object of that Statute was: it was only to apply the law which had been lately enacted in England, as to an offence partly committed in one part and completed in another, to the East Indies, and not to make a new enactment rendering persons liable to punishment for a complete offence, who would not have been liable before. If the result of our decision should

be, that those appellants are to escape from justice, we shall regret it; but that is a matter which cannot influence our judgment. **Vol. IV,**

If the Mofussil Court has no jurisdiction now, by virtue of the East India Company's Regulations, to dispose of this case, they must escape justice; but we are not, in any way, to alter or construe differently the rules of the criminal law in consequence of the supposed justice of a particular case. The rule is, that that law is to be strictly construed; and so construing it, or even without that strictness, the construction of this 56th Section appears to us to require us to pronounce in favor of the appellants.

RULINGS OF THE HIGH COURT IN CRIMINAL CASES

The 4th January 1866.

Present :

The Hon'ble W. S. Seton-Karr, *Judge.*

Evidence (Statement of prisoner).

Queen versus Suneechur.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of murder.

The statement of a prisoner, whether taken as a confession or an examination, may be received as evidence.

I SENT for the papers in this case, although there seemed a great doubt whether the appeal was really in time, because there was something not quite clear in the Sessions Judge's charge.

Read with the evidence, which has now arrived, the charge is quite clear.

The statement of the prisoner before the Magistrate is evidence in this case, whether it were taken as a confession or as an examination. His guilt is quite clear from this statement independent of other testimony.

The conviction and punishment are fairly sustainable under the Sections for either murder or dacoity, and the prisoner deserves no sympathy, inasmuch as he was admitted to be Queen's evidence, and then deliberately refused to state what he knew.

I reject the appeal.

The 4th January 1866.

Present :

The Hon'ble W. S. Seton-Karr.

Misdirection by Sessions Judge.

Queen versus Sheikh Magon.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of grievous hurt.

Though the Sessions Judge ought not to have made any remarks as to what the witnesses for the defence

stated themselves to have heard, this slight error was held not to amount to a misdirection. **Vol. V.**

This seems to be an extremely clear case depending on the evidence which was, as far as regards the prosecution, properly laid before the Jury by the Sessions Judge. The Sessions Judge should not, however, have made any remarks as to what the witnesses for the defence stated themselves to have heard.

But this slight error does not, in any way, amount to a misdirection, and the case against the appellant mainly rests on the evidence for the prosecution, which was clear enough, and was properly dealt with. The conduct of the prisoner Magon was wholly without excuse.

There is no necessity to send for the papers. Appeal rejected.

The 8th January 1866.

Present :

The Hon'ble J. B. Phear and F. A. Glover, *Judges.*

Amends—Unlawful compulsory labor.

Rateeah versus Phokondree and another.

Referred under Section 434 of Act XXV. of 1861, and Circular Order No. 18, dated the 15th July

Amends cannot be awarded in a case under Section 374 of the Penal Code (unlawful compulsory labor) which comes under Chapter XIV. of the Code of Criminal Procedure.

It has been frequently ruled by this Court that amends can only be awarded in cases coming under Chapter XV. of the Code of Criminal Procedure. The offence with which the party was charged was under Section 374 of the Penal Code, and consequently coming under Chapter XIV. of the Procedure Act.

The order of the Deputy Magistrate was, therefore, illegal, and the amount levied as awards must be refunded.

Vol. V.

The 8th January 1866.

*Present :*The Hon'ble J. B. Phear and F. A. Glover,
*Judges.***Evidence**—(as to character of bad livelihood of
accused)—Report of Police Officer.*Referred under Section 434 of Act XXV. of
1861, and Circular Order No. 18, dated
the 15th July 1863.***Queen versus Alum Sheikh.**

A Magistrate should take evidence as to the general character of a person charged with bad livelihood, and not convict him on the report of a police officer which is not evidence except against the officer making it.

*Extract (para. 4) of Letter No. 629, from
the Sessions Judge of Rayshahye, dated
the 16th December 1865.*

3. The Deputy Magistrate of Serajgunge has convicted the prisoner upon what is not legal evidence, viz., on a report of the police officer of Muthoor Station, which describes the prisoner as a person of inveterate bad character, who lives by robbery and theft. The police report may be perfectly correct, but the law requires the Magistrate to take "evidence as to the general character" of the person charged with bad livelihood (Section 206), and a police report is not "evidence of the facts stated therein, except (Section 154) against the police officer who makes it." In the case of theft of which the prisoner had been previously convicted, no proof of his general character had been adduced.

it necessary, to proceed against Alum Sheikh according to law.

The 8th January 1866.

*Present :*The Hon'ble J. B. Phear and F. A. Glover,
*Judges.***Jurisdiction (of High Court)**—Extra-judicial
opinion of Sessions Judge.**Miscellaneous Case.****Pal Charrier and others, Appellants.**

The High Court has no jurisdiction to quash the proceedings of a Sessions Judge, and to declare that the Sessions Judge acted illegally in making any observations upon the merits of a case in which, while admitting that he had no power to interfere, he should not have passed any opinion upon the evidence.

This case was finally dealt with by the Magistrate in the first instance. On the application of complainant, the Sessions Judge called for the record pursuant to Section 434 of the Criminal Procedure Act,

for the purpose of satisfying himself as to the legality of the Magistrate's order, and the regularity of the proceedings before him. The result of the Sessions Judge's investigation was that he found no reason for referring the proceedings to this Court, but he took occasion to review the evidence in the case, and to express his disapprobation of the decision of the Magistrate, particularly as regards the view which the Magistrate took of the complainant's conduct. The Sessions Judge did not, however, attempt to interfere with the Magistrate's order. We are now asked to declare that the Sessions Judge acted illegally in making any observations upon the merits of the case, and, therefore, that the proceedings before him ought to be quashed. It is only necessary for us to observe that we do not consider we have jurisdiction under the circumstances to deal with the case. It is unfortunate that the Sessions Judge, while admitting that he had no power to interfere, should have considered himself justified in giving any opinion upon the evidence. But the only thing that we can look at is the judicial conclusion at which he has arrived, and we see no legal ground upon which that can be impeached.

The 12th January 1866.

*Present :*The Hon'ble Sir Barnes Peacock, *Kt.*,
Chief Justice, the Hon'ble F. B. Kemp,
and W. S. Seton-Karr, *Judges.***Murder (Procedure in acquitting of)**—High
Court (Powers of, as to correction of wrong
acquittal, and enhancement of sentence).**Queen versus Toyab Sheikh.***Committed by the Joint Magistrate, and
tried by the Sessions Judge of Tipperah,
on a charge of murder.*

A Judge should clearly acquit a prisoner of murder when so charged, instead of merely finding him guilty of culpable homicide not amounting to murder.

When a Judge acquits a prisoner of murder, the High Court cannot, either as a Court of Appeal or as a Court of Revision, find that, according to the evidence, the prisoner caused death with the knowledge mentioned in Clause 4, Section 300 of the Penal Code; nor can the High Court, however wrong it may think the Judge to have been in acquitting of murder, or however inadequate it may think the sentence to be, correct the error or enhance the sentence.

This case turns upon a question of fact.

1st—For murder.*2nd*—For culpable homicide not amounting to murder.

The first Court did not state all the facts necessary to constitute murder. It merely stated that the prisoner committed culpable homicide amounting to murder by causing the death of Ramzan, negating the Exceptions to Section 302. It was not necessary, under Chapter XIII. of the Code of Criminal Procedure, to state all the facts which were necessary to constitute the offence.

If the charge had been expanded, it would have stated that the prisoner caused the death with the intention of causing death, or with the intention mentioned in Clause 2 or 3 of Section 300 of the Penal Code; or that he caused the death by doing an act which he knew to be so imminently dangerous, that it must, in all probability, cause death, or such bodily injury, &c., so as to bring the case within Clause 4, Section 300 of the Penal Code.

It appears to us that, by finding the prisoner guilty of culpable homicide not amounting to murder, the Sessions Judge and Assessors, in substance and effect, acquitted him of culpable homicide amounting to murder; and consequently acquitted him as well of an intention to cause death as of the knowledge that the act done was so imminently dangerous as to bring the offence within Clause 4, Section 302, in the same way as they would have acquitted him, if they had expressly found that he caused the death with the knowledge that the act was likely to cause death, but without the intention mentioned in Clause 1, 2, or 3 of Section 300, and without the knowledge mentioned in Clause 4 of that Section.

If they had expressly acquitted him of murder in that way, it would not have been competent to this Court, either as a Court of Appeal or as a Court of Revision, to find that, according to the evidence, the prisoner caused the death with the knowledge mentioned in Clause 4; for whether the death was caused with that knowledge or not was entirely a question of fact.

As a Court of Appeal they could not have done so in consequence of Section 467.

As a Court of Revision, they could not have done so, as the error was not one of law, nor was the sentence illegal (see Sections 403, 404, and 405 of the Code of Criminal Procedure).

However wrong the Court may think that the Sessions Judge and Assessors were in acquitting of murder, they have no power, in our opinion, to correct the error. However inadequate they may consider the sentence, they have not, in our opinion, any

power to enhance it, as the sentence is one which is authorised by law for the offence of which the prisoner was found guilty.

We may remark that we do not concur with the reasons upon which the Sessions Judge acquitted the prisoner of the graver charge, and we are of opinion that, even upon the Sessions Judge's own view of the case, the sentence is far too lenient, for, even admitting that the prisoner was not guilty of culpable homicide amounting to murder, he was guilty of culpable homicide not amounting to murder of the gravest character. If we had power to enhance the punishment, we should not hesitate to sentence the prisoner to ten years' transportation, the heaviest sentence which can be passed for culpable homicide not amounting to murder, where there is no intention to cause death, under Section 304 of the Penal Code.

The 13th January 1866.

Present:

The Hon ble W. S. Seton-Karr, *Judge*.

Misdirection (by Judge).

Queen versus Narain Bagdee and others.

Committed by the Magistrate, and tried by the Sessions Judge of Houghly, on a charge of dacoity.

It is no misdirection for a Judge to tell the Jury that, if the prisoner could not prove how he became possessed of certain articles (however small in value and common in use they may have been), it was then duty to convict him, for the presumption in such a case was legally valid that he knew that the property had been unlawfully acquired, &c. The Judge drew the attention of the Jury especially to the defence.

I HAVE read the charge carefully, and have heard the arguments of the pleader in favor of the prisoner, which are to the effect that the Sessions Judge misdirected the Jury as regards the prisoner Chunder Holdar, in telling them that, if the prisoner could not prove "how he became possessed" of articles numbered 6 and 7, it was their "duty to convict him of the charge laid against him; for that the presumption in such a case was legally valid that he "knew" that the property had been unlawfully acquired, &c., &c.

Now, the Jury had before them two different versions as to the ownership of these articles, and their attention was specially drawn to the witnesses for the defence, and to the arguments of the vakeel that the property was not found concealed. The Jury thought proper to reject this evidence,

Vol. V. and to believe that for the prosecution. Under this belief, the presumption pointed out by the Sessions Judge became a fair legal presumption, and conviction followed.

I am unable to discover anything that amounts to a misdirection in this. The articles, it may be true, were of small value, and in common use; but these are matters for the Jury, and we cannot interfere.

The appeal must be rejected.

The 15th January 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges*.

Nuisance (Removal of)—Personal Service of Notice.

Miscellaneous Case.

Hochan vs. Elliot.

The mere non-service personally of a notice to remove a nuisance is not a sufficient ground for the Court, under Section 434 of the Code of Criminal Procedure, to set aside the Magistrate's order, when it appears that the parties did not take the objection before the Magistrate, and that they in fact admitted knowledge of the existence of the notice, and sought to excuse their failure to obey it.

THE ground on which we are asked to set aside the order of the Magistrate is that the notice to remove the nuisance was not served personally on the defendants. No doubt, if the objection had been taken in the first instance by those most interested in it, it might have been fatal to the conviction. But, as it appears from the Magistrate's Memorandum that the parties did not take the objection, and that they in fact admitted that they knew of the existence of the notice, and that they failed to obey it, for certain reasons which they gave, it does not appear to us that there is any substantial error or defect in the proceedings as regards the notice, and, therefore, we decline to interfere.

The 15th January 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges*.

Bribery (by Police Officer).

Government *versus* Chunder Coomar Sein.

Referred under Section 434 of Act XXV. of 1861.

In addition to punishing a Police Officer with fine under Section 161 of the Penal Code for taking a bribe, the Joint Magistrate in his administrative capacity ordered his dismissal. HELD that the order of fine and the order of dismissal should not be treated as one sentence beyond the competency of the Joint Magistrate to pass.

WE see no reason for interfering in this case. The offence of which Chunder Coomar was found guilty was one punishable under Section 161 of the Penal Code, either by imprisonment or fine; and the Joint Magistrate, who preferred to inflict the latter punishment, was quite within the law. The sentence of dismissal was one entirely apart from the Joint Magistrate's authority as a Magisterial Officer, and was passed in his administrative capacity. The defendant had the right, if he thought fit, to appeal against this portion of the order to the proper authorities separately, and the Sessions Judge was, we think, wrong in treating the order of fine and dismissal as one sentence which the Joint Magistrate was not competent to pass.

With regard to the concluding part of the Sessions Judge's reference, we observe that the offence under Section 161 of the Penal Code was one in which a summons would ordinarily issue, and came, therefore, under Chapter XV. of the Code of Criminal Procedure, so that Sections 251 and 252 of that Code do not apply.

The case is provided for by Section 265, and it appears, from the Joint Magistrate's proceedings on the record, that the substance of this complaint was stated to the accused person, and he was asked what he had to say in defence.

In no point of view, therefore, do we consider the Joint Magistrate's order an illegal one.

The 15th January 1866.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Nuisance (Removal of)—Obstructions on Thoroughfares.

Referred under Section 434 of Act XXI. of 1861.

Barodlapersad Mustafee, *Petitioner.*

versus

Mudoo Soodun Biswas, on behalf of Gorachand Mustafee, *Opposite Party.*

A Deputy Magistrate should proceed under Chapter XX. of the Code of Criminal Procedure for the removal of an unlawful obstruction from a thoroughfare, and not under Section 320, which relates to disputes concerning use of land or water.

Extract (paras. 2, 3, 4, and 5) of Letter No. 145 from the Officiating Sessions Judge of Jessore, dated the 2nd December 1865.

2. One Mudoo Soodun Biswas, on behalf of Gorachand Mustafee, preferred a complaint before the Deputy Magistrate of Khoolna, on the 12th October 1865, to the effect that Baroda Persad Mustafee had stopped a public thoroughfare by building a house on it.

3. The Deputy Magistrate enquired into the case, and having found that the road in question was a public thoroughfare, and that it had been closed in the manner stated by the defendant, he disposed of the case under Section 320 of the Criminal Code of Procedure, and ordered that no party was to take possession of the road to the exclusion of the public, and he directed the police to re-open the thoroughfare.

4. It appears to me that the Deputy Magistrate has proceeded under a wrong Section of the Code, and that he ought to have conducted his proceedings in accordance with Section 308 and the following Sections, which provide for the removal of unlawful obstructions from thoroughfares.

5. I, therefore, beg to recommend that the Deputy Magistrate's order be reversed, and that he be directed to commence proceedings afresh under Chapter XX. of the Criminal Procedure Code.

We have read the Deputy Magistrate's proceedings and the Sessions Judge's letter, and we concur with the Sessions Judge. The order of the Deputy Magistrate is reversed, and he will commence proceedings *de novo* under Chapter XX.

The 15th January 1866.

Present :

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Wrongful Confinement (to extort confession, &c.)

Dhunraj Singh *versus* Peetumber Doss.

Referred under Section 434 of Act XXI. of 1861, and Circular Order No. 18, dated the 15th July 1863.

A sentence of fine only cannot be passed under Section 348 of the Penal Code (wrongful confinement to extort confession, &c.); part of the sentence must be imprisonment.

THE sentence passed by the

Extract (paras. 2, 3, and 4) of Letter No. 68, from the Sessions Judge of Backergunge, dated the 2nd December 1865.

2. The order of the Officiating Joint Magistrate was a fine of 25 rupees; in default of payment, rigorous imprisonment for three months.

3. This order is illegal, as, under the above Section, a sentence of fine only cannot be passed; part of the sentence must be imprisonment.

4. The fine is below the appealable amount, and therefore the case is forwarded to the High Court in order that the sentence may be quashed.

to him in order that he may pass a legal sentence.

Officiating Joint Magistrate, not being in accordance with the provisions of Section 348 of the Indian Penal Code, is quashed, and the record will be sent back

The 15th January 1866.

Present :

The Hon'ble G. Campbell, *Judge.*

Cheating.

Queen *versus* Heeramun Hulwye.

Committed by the Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of cheating.

The mere taking money one day, and dishonestly running away without paying the next day, is not necessarily cheating. There must be an intention to deceive and defraud at the time of taking the money, and the subsequent conduct of the prisoner would only be evidence to show the previous dishonest intention.

THE prisoner has been convicted of cheating by the verdict of a Jury. There is perhaps some want of precision in the charge of the Sessions Judge. The mere taking money one day, and dishonestly running away without paying the next day, is not necessarily cheating. There must be an intention to deceive and defraud at the time of taking the money, and the subsequent conduct of the prisoner would only be evidence to shew the previous dishonest intention. Still in this case it appears that there could be no doubt in fact of the dishonest intention, if the evidence were believed, and that the real question was one of identity clearly found by the Jury. No grounds for interfering with the verdict are urged in the petition of appeal, and I reject it.

Vol. V.

The 15th January 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Evidence (Proof against each Prisoner)—Confessions of Prisoners—Transmission of evidence by Magistrate.

Queen versus Kodai Kahar and others.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Dacca on a charge of dacoity.

The Magistrate in his grounds of commitment, and the Sessions Judge in his conviction should specifically note with exactness and precision the proof against each particular prisoner, and the manner in which it is supported.

To give weight to confessions of prisoners recorded under Section 149, Code of Criminal Procedure, there should be a judicial record of the special circumstances under which such confessions were received by the Magistrate, showing in whose custody the prisoners were, and how far they were quite free agents.

In a preliminary enquiry before a Magistrate, the evidence should be sent in as found, and not kept by the police till they have made it all complete.

This is a complicated and difficult case rendered more so by the circumstance that the first report and first police investigation did not disclose the offence now charged, and that the evidence has implicated several other persons, besides the present prisoners, in charges not supported to conviction.

There has been a full investigation; but the circumstances are so peculiar, and the evidence against the prisoners is so limited in its compass, that we could wish that, instead of going so far a field, both the Magistrate in his grounds of commitment, and the Sessions Judge in his conviction, had specified with greater exactness and precision the proof against each particular prisoner, and the manner in which it is supported. On this, the real gist of the case, we find, in the midst of a long and discursive judgment, only a general remark that the charge is proved against the prisoners generally by the confessions before the Magistrate, and the recovery of certain articles of property with no specification of the proof against each individual.

The confessions before the Magistrate cannot be said to have been made in answer to any specific charge; they seem to have been taken weeks before any formal charge was regularly preferred before the Magis-

trate, and before the witnesses were sent in, and can at best only be considered admissions made in the presence of a Magistrate, and admissible in evidence under Section 149 of the Criminal Procedure Code. Confessions are so often in this country obtained by undue influence that, in order to give weight to those recorded under Section 149, we think that there should always be made a judicial record of the special circumstances under which such confessions were received by the Magistrate, shewing in whose custody the prisoners were, and how far they were quite free agents. Nothing of this is to be found in the record of the present case, and we are unable to understand why the witnesses were not sent in till weeks after. A preliminary enquiry before a Magistrate is not the same thing as a trial before a Judge. The evidence should be sent in as found, not kept by the police till they have made it all complete. We also think that there should have been a much fuller and more precise examination of the witnesses regarding the circumstances of the apprehension and confessions with reference to the prisoner's allegation of maltreatment.

Taking, however, the case as it stands, we have against all the prisoners the confessions recorded by the Magistrate, and further against Kodai, No. 49, certain evidence to recognition, such as it is (the alleged recovery of three rupees in cash, part of the stolen property, is not proved as it ought to have been).

Against Lall Mahomed, son of Allaluddee, No. 50, the evidence of the Inspector of Police that his information led to the discovery of a small portion of the stolen property.

Against Lall Mahomed, son of Hubboo, the recovery from him of certain small items of the property identified as that stolen.

Against Sher Allee, No. 52, the recovery of a chair.

Against Futtick, No. 53, the recovery of several items.

The case is no doubt somewhat weak, especially against Nos. 49 and 50. But, on the whole, we think that it is one in which it was for the Court trying the case to judge of the credibility of the evidence; and we do not see grounds for the interference of this Court, with a concurrent verdict of the Sessions Judge and Assessors. We dismiss the appeal.

The 15th January 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Charges (Only one count for each offence)—
Culpable Homicide not amounting to Murder
— Emasculation.

Queen *versus* Baboolun Hijrah and others.

Committed by the Magistrate, and tried by the Sessions Judge of Gya, on a charge of homicide caused by emasculation.

One count charging each specific offence and describing it with a reasonable degree of certainty is sufficient.

Where a man of full age (*i. e.*, above 18 years) submits himself to emasculation, performed neither by a skilful hand, nor in the least dangerous way, and dies from the injury, the persons concerned in the act are guilty of culpable homicide not amounting to murder.

This is an important case of homicide caused by emasculation. The operation was performed with the consent of deceased, and, indeed, it would appear at his request, he paying the operator. But it seems to have been by no means performed by a skilful hand or in the least dangerous way: in truth, the whole private parts were simply cut off. There seems to have been no proper ligatures, and it can hardly admit of doubt that death was a very likely result of such a hurt. Death did, in fact, intervene in a few hours. The case has been very carefully committed and tried. It should, however, be remarked that the charge seems to be complicated to an unnecessary intent, by charging the same offences repeatedly in slightly different forms, and entering into excessively particular details regarding the weapon, &c., &c. We are not acting under a Procedure in which no amendment is allowed, and any variance from very precise charges would be fatal. Under our Procedure, one count charging each specific offence, and describing it with a reasonable degree of certainty, would seem to suffice.

On the other hand, one important point does not seem to be noticed either by Judge or Magistrate, *viz.*, whether deceased was above 18 years, so that his consent should suffice (other points apart) to exempt the prisoners from a charge of murder [see Penal Code, Section 300, Exception 5]. If they were not protected by the last-mentioned Exception, the case might have gone so near the confines of murder, that it might have been prudent to try the prisoners on a count for murder. The finding of the

Sessions Judge, indeed, is in so far somewhat obscure; for, if, as he finds under the two counts, the prisoners knew that their act was likely to cause death, the fact must be that the wound *was* likely to cause death. If so, there was culpable homicide under the first count, by intentionally inflicting such bodily injury as was likely to cause death; and this latter offence, coupled with the knowledge that death was likely to result, found by the Sessions Judge, would be murder under Section 300 Clause 2.

Although, however, the Committing Magistrate and Judge only speak of the deceased as above 12 years of age and "a grown man," still, in the proceedings before the Magistrate of Bhaugulpore, he is described as a man of 25 years, and we may give the prisoners the benefit of the supposition that the deceased was in fact above 18 years, when he consented to take the risk of death. It is also possible that the prisoners were in fact ignorant men, who did not know that a fatal result was probable. They were all eunuchs, upon whom a similar operation must have been performed. The case being then one in which a man of full age submits himself to emasculation (performed in this rough and dangerous way), of what offence are the prisoners guilty, and of what degree of punishment are they worthy? Their appeal in the main amounts to this, that they never understood the practice of emasculation to be forbidden; that they acted under the free consent, and at the express request, of the deceased; and that, till the practice is publicly forbidden, they should not be punished. There is also some question as to the degree of guilt of the minor actors, and the principal actor is a decrepit old man of 70. We think the Court below is right in holding that Section 88 of the Penal Code, coupled with the explanation appended to Section 92, does not justify the infliction of such an injury (although it was not intended to cause death for the mere pecuniary benefit of the person voluntarily submitting to it), and that (without going into particulars of the various counts) the prisoners are rightly convicted of culpable homicide. But looking to the full and intelligent consent of the deceased, to the possible ignorance of the prisoners, and to the age of the most guilty among them, we think the sentences passed unnecessarily severe, and substitute the following: Mukhun and Hossein Buksh, each three years' rigorous imprisonment; Baboolun and Suniroo, each two years' rigorous imprisonment.

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The 15th January 1866.

Present :

The Hon'ble L. S. Jackson and F. A.
Glover, *Judges*.

Confiscation.

*Referred under Section 434 of Act XXI. of
1861, and Circular Order No. 18, dated
the 15th July 1863.*

Jhundoo Sing and others, *Petitioners*.

The Joint Magistrate's order of confiscation set aside, (1) because made without permitting the accused to show cause against the confiscation of his goods, (2) because the confiscation ought not to be carried out where the accused has been apprehended and brought to trial before the passing of the order, and (3) because the Joint Magistrate acted in contravention of the order of the Magistrate releasing the property from attachment.

We think the order of the Joint Magistrate in this case ought to be set aside.

First, because the petitioner has not been heard. We consider that he ought to have been permitted to show cause against the confiscation of his goods; and that the Joint Magistrate was not at liberty to consider such a hearing superfluous on the ground that the petitioner's plea had been overruled in his trial for the substantive offence with which he was charged.

We have also grave doubts whether the confiscation ought to be carried out in a case where the accused has been apprehended and brought to trial before the order is passed.

We are further inclined to think that the Magistrate's direction to his subordinate to write to the Collector, and authorize the taking off of the attachment, amounted to an order releasing the property from attachment, and that the Joint Magistrate's proceedings, in contravention of that order, were unwarranted.

We, therefore, set aside the order of the Joint Magistrate, and direct that the proceeds of the property sold be refunded to the petitioner, or, if not sold, that the property itself be restored.

The 16th January 1866.

Present :

The Hon'ble J. B. Phear and F. A. Glover,
Judges.

Perjury and Forgery (committed before 1st
January 1862)—*Procedure*.

Miscellaneous Case.

Radhajeelun Moostaftee, *Petitioner*.

A case of perjury or forgery alleged to have been committed in a case before a Civil Court before the 1st January 1862 can be dealt with only under the old Procedure Law (Act I of 1845), according to which the sanction of the Court before which the offence is alleged to have been committed is necessary before criminal proceedings can be instituted.

Phear, J.— This petition seeks to have the sanction given by the Judge of Hooghly to the institution of certain criminal proceedings against the petitioner, declared void and inoperative, by reason of its having been given without jurisdiction. The material facts of the case, as detailed by the Judge himself, are as follows.

On the 30th July 1859, the present petitioner sued one Ramkisto Turkolunkar before the Moonsiff of Pundooah for the enhancement of the rent of certain land held by the defendant. The plaint was verified by the plaintiff's mooktear, Dinonath Dutt. Ramkisto's defence was that the land was held at a fixed jumma under two pottahs which he produced. The Moonsiff considered the pottahs to be proved, and dismissed the suit. The Principal Sudder Ameen on appeal affirmed this decision, and finally, on the 12th June 1863, the proceedings being brought before the High Court by special appeal, this Court refused to interfere.

At the original trial of the suit, which, for some reason or another, extended over a considerable period of time, Dinonath Dutt appeared as a witness for the plaintiff, and was examined on the 17th September 1859. Afterwards, on the 17th December 1859, the plaintiff's vakeel filed certain *jumma wasilbakke* papers, which supported Dinonath Dutt's evidence, and were completely inconsistent with the terms of the alleged pottahs relied upon by the defendants; also, on the 22nd November 1859 and 6th January 1860, one Madhub Chunder Chowdhry and one Gobind Mundal respectively made oral depositions confirmatory of that of Dinonath Dutt.

When this litigation had come to an end, Ramkisto, not satisfied with his success, by a petition to the Moonsiff, dated 11th July 1864, sought his permission to prosecute the

plaintiff and his witnesses, and, by a second petition, dated the 3rd January 1865, he specified the charges which he desired to make as follows: viz., against the present petitioner he wished to charge the offences described in Sections 199, 209, 193, and 109 of the Penal Code; against Dinonath, the offences described in Sections 109, 209, and 193 of the Penal Code; and against Gobind and Madhub, that described by Section 193 of the same Code. Again, on the 1st July 1865, Ramkisto further petitioned to be allowed to prosecute Madhub under Section 199 of the Penal Code, as well as under Section 193. The Moonsiff granted all these applications simultaneously by an order, dated the 1st July 1865, and, accordingly, on the 23rd August 1865, proceedings were taken against these four persons before the Magistrate.

Once more, on the 11th July 1865, Ramkisto applied to the Moonsiff for permission to prosecute; this time he asked to be allowed to make a charge under Sections 471 and 109 against the plaintiff in respect to the above mentioned *jumma taxvillakee* papers, and against the plaintiff's vakeel under Section 471. The Moonsiff refused to give the permission requested in this last petition, giving, as the reason for his refusal, "that the Civil Courts in which the suit and appeals were tried had made no comment on the said documents, and that, as he had not himself tried the case, he was not so competent to determine now as to the truthfulness or falsity of the documents; and that it is not the intention of the law that a party should be permitted to bring continual charges by splitting them up into different forms; and that, as Radhajeetun was a zemindar, it was not probable that he was cognizant of the alleged falsity of the documents."

On the 31st October of the same year, Ramkisto petitioned the Judge to give him the permission which was refused by the Moonsiff. The course which the Judge took with reference to this application is thus described by himself:

"I was of opinion, after perusal of the record, that the reasons given by the Moonsiff were not tenable. The fact of his having already given permission to prosecute Radhajeetun for abetting the alleged giving false evidence in the suit based on these very documents, and the fact that the Civil Original Court and Appellate Court had rejected these very documents, on the principle that the poi-

tahs, in every way opposed to these documents, were true, were quite sufficient to justify permission to prosecute on a charge of abetting the offence under Section 471 with regard to these documents, while it was absurd to refuse permission to prosecute on the ground that, as a zemindar, it was not probable that Radhajeetun was cognizant of the alleged falsity of the documents when permission had already been given to prosecute that very zemindar for abetting the offence of giving false evidence, &c., as regards those very documents; and, as the law does not forbid a person to prosecute another on various separate charges one after the other, and as the case under Section 199, &c., was still under enquiry by the Joint Magistrate, I, on the 4th ultimo, under Section 170 of the Code of Criminal Procedure, gave the required permission to prosecute Radhajeetun; but, not being satisfied of any valid grounds for prosecuting the said Abdool Ali Vakeel (who was indeed a material witness as regards the filing of these documents), I refused permission to prosecute him."

It is not for us to say whether the determination of the Moonsiff in this particular matter, or that of the Judge, the better recommends itself to our minds. Of course, a stale charge of this character would, without hesitation, be rejected by an intelligent Jury, unless extremely good reasons were shewn to them why it was not promptly instituted immediately upon the alleged offence being committed, and unless, further, the vexatious and harassing circumstances which apparently attend the making of the charge were well explained away, and doubtless the Judge acted with the full apprehension that it was his special duty to take care that Radhajeetun should not be subjected to a trial which could only lead to such a result. But, if this case is governed by the Criminal Procedure Act alone, the bare sanction of the Judge, given in the due exercise of his judicial discretion, will be sufficient to give validity to the prosecution, notwithstanding the previous refusal of the Moonsiff (see *Dinobundho Chuckerbutty*, decided by this Court on the 8th August 1865, and the case referred to in that judgment). Moreover, we are not disposed to assume, merely from the absence of any indication to the contrary, that the Judge, when giving the permission in question, did not bear fully in mind that his discretion was invoked by the Legislature for the sole purpose of protecting

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The only question which we can here entertain is whether or not the Criminal Procedure Act, and that Act alone, applies to this case. That Act came into general operation on the 1st January 1862, and the criminal charges were sought to be made in the years 1864 and 1865. But, on the other hand, the offences which form the subject of these charges, if established according to the allegations of the prosecutor, were committed in the year 1859; and with regard to offences committed before the 1st January 1862, and prosecuted afterwards, some special legislation was effected by Act XVII. of 1862. A considerable number of Acts and Regulations are set forth in the Schedule to that Act, and the first Section says in effect that so many and so much of those Acts and Regulations as provided for the "punishment of offences," "except as to any offence committed before the 1st day of January 1862," "shall be held to have been, and are hereby, repealed from the 1st day of January 1862" throughout the whole of the territorial limits, up to which they were respectively in operation at that date. The second Section in like manner declares that the whole of the Acts and Regulations mentioned in the Schedule, which are not dealt with by the first Section, "shall be held to have been, and are hereby, repealed from the 1st day of January 1862," "except as to any offence committed before" that date throughout all the territorial area over which those Acts and Regulations were then in operation, and in which the Code of Criminal Procedure then came into operation. In short, these two Sections, taken together, enact that, at least in places where the Criminal Procedure Code came into operation on the 1st January 1862, there all the Acts and Regulations mentioned in the Schedule were immediately and from that time repealed, "except as to any offence committed before that day." But, of course, the effect of this exception is to enact

that, as regards offences committed *before* the 1st of January 1862, the Acts and Regulations in question remained in force from and after the 1st January 1862, unless otherwise repealed. Consequently Act I. of 1848, one of the Acts mentioned in the Schedule, so remains in force, unless it has been repealed otherwise than by the two first Sections of Act XVII. of 1862; and it is admitted that, if it is still in force as regards offences committed before 1st January 1862, then the sanction of the Judge pretended to be given to the prosecution in this case is altogether a useless and void proceeding, because confessedly the prosecution is not set on foot by the Court before which it is alleged that the offences were committed or even on any suggestion from it, and the 1st Section of Act I. of 1848 forbids Magistrates from receiving any charges of these kinds, except when actually sent to them by the Civil Court in the manner provided by the 2nd Section of the same Act. But it is said that, although Sections 1 and 2 of Act XVII. of 1862 leave Act I. of 1848 unrepealed, yet the subsequent Sections 4 and 6 impliedly effect its repeal. We think this is not so. The 6th Section is directed solely to the case of *sentences* actually passed before the passing of this Act, and can have no bearing on the point; and Section 4 says: "In the investigation and trial of offences committed before the 1st day of January 1862, the Criminal Courts of the several grades, and the officers of police shall, after the passing of this Act, be guided by the provisions of the Code of Criminal Procedure so far as the same can be applied." This, it is urged, brings into play Section 170 of the Criminal Procedure Act. No doubt, it does so in all cases where there is scope for its action. But we are unhesitatingly of opinion that it does not of itself by implication repeal any law for the purpose of affording such scope. The words "so far as the same can be applied" seem to us to have been expressly employed to guard against any construction being given to this Section, which should have the effect of repealing existing law. But, even had those words been absent from Section 4 of Act XVII., we should have come to the same conclusion as we now do, because the object of Section 170 of the Criminal Procedure Code is, properly, not mere matter of procedure, but to throw a certain degree of protection over the person charged with the particular offence there mentioned. The

object of Act I. of 1848 is also (although in a different manner) to give him protection in a similar case. We cannot declare that the one privilege is to be in substitution of the other unless the Legislature has unmistakably notified its intention that it should be so. There are, however, no words to this effect, and in our judgment the last provision of Section 4 of Act XVII. is in spirit opposed to any unsupported supposition that the Legislature desired to take away any advantage already enjoyed by persons situated as is the petitioner now before us.

We declare that the sanction of the Judge, mentioned in the petition, is inoperative to give validity to the institution of criminal proceedings before the Magistrate, and we direct that it be withdrawn.

Glover, J.—I would merely add to the above judgment, in which I fully concur, that the words used in Section 4, Act XVII. of 1862, "so far as the same" (the new Criminal Procedure Code, that is) "can be applied," must mean a just and reasonable application, and cannot have the effect of placing those accused of offences committed before the Act came into operation in a worse position than they were before, or by an "*ex post facto*" legislation make a man guilty under circumstances which would, under the old procedure, have freed him from liability. And as, under the old procedure, the person accused of perjury or forgery in a case before a Civil Court was in the hands of that Court only, it would be unjust to subject the accused in this case to a procedure which takes away from him the benefit of the Moonsiff's refusal to commit, which refusal would, before the 1st January 1862, have been final, and have operated as an estoppel to any subsequent prosecution.

The 16th January 1866.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Evidence—Accomplice—Corroboration—Section 28, Act II. of 1855.

Queen versus Godai Raout.

Committed by the Magistrate, and tried by the Sessions Judge of the 24-Pergunnahs, on a charge of abetment of the offence of administering stupefying drug, with intent to facilitate the commission of theft.

A Jury may convict upon the evidence of an accomplice, though not corroborated so as to show the prisoner's actual participation in the offence.

Section 28, Act II. of 1855, applied only to the old Supreme Courts, and the rules and practice prevailing in them, and does not show that in the Courts of the Mofussil corroborative evidence is legally requisite to support the testimony of an accomplice.

We have heard Mr. Cochrane for the appellant in this case, and we have given the point raised very full consideration.

The appellant has been found guilty of abetment of the offence of administering a stupefying drug to certain women, with intent to facilitate the commission of theft, in consequence of which abetment the offence was committed. He appeals on the ground that he has been convicted on the uncorroborated evidence of an approver (already himself convicted of the offence), and that, as a matter of law, he should, on such evidence, not have been convicted. He further appeals on the ground that the Sessions Judge misdirected the Jury, inasmuch as he did not direct them that there was no evidence corroborative of that of the approver.

On the evidence of the approver, it appears that, while two other persons went to the house of the women in question, and actually drugged and plundered them, the approver and the appellant remained at a spot some little way off on a bridge, where they were afterwards joined by the other two on their return from the house with the booty. In addition to the statements of the approver, there is nothing against the prisoner, except that the women identified him as being a person who, on various occasions for fifteen days prior to the drugging, had come to their house in company with one of the two persons who actually did drug and rob them. There is, in fact, no corroborative proof of the prisoner having actually participated in the offence charged. The case was tried by a Jury, and the Sessions Judge in his summing up warned the Jury carefully that the approver's evidence must be received with suspicion and guardedly, and that it must be corroborated. But he did not direct the Jury that the approver's evidence was not corroborated, and he left the whole question of fact to them, directing them on a review of the whole evidence to say whether the appellant was or was not guilty of the offence charged. The Jury having found the prisoner guilty, he appeals to this Court on the grounds stated above.

The appeal must be dismissed. The conviction was on a trial by Jury, and in such a case an appeal is admissible on matters of law only (Section 408 of the Criminal Procedure

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Code). It is, no doubt, true that Judges will, in their discretion, advise a Jury not to convict a prisoner upon the testimony of an accomplice alone and without corroboration; and except, under special circumstances, it is not the practice for the Jury, when so advised by the Judge, to convict a prisoner upon the sole and uncorroborated evidence of an accomplice. But no positive rule of law exists on the subject, and the Jury may, if they please, act upon the evidence of an accomplice, even in a capital case, without any confirmation of his statement (*see Taylor on Evidence*, 2nd Edn., pp. 778, 779, and the cases there cited). And—as indeed appears from the report of a case specially cited in support of the appeal, *Regina vs. Farler*, 8 Car. and Payne 106—the Judges do not, in such cases, withdraw the cause from the Jury by positive directions to acquit, but only advise them not to give credit to the testimony.

Under the circumstances, neither the direction of the Judge, nor the conviction by the Jury, is shewn to be wrong in any matter of law, and the conviction must be upheld by us.

It has been contended that Section 28 of Act II. of 1855 shows that corroborative evidence is legally requisite to support the testimony of an accomplice. But we do not think that that Section shows this, or in any way alters the law as previously existing on this subject. Section 28, after declaring that, except in cases of treason, the direct evidence of one witness who is entitled to full credit shall be sufficient proof of any fact, provides that this declaration shall not affect any rule of practice that requires corroborative evidence in support of the testimony of an accomplice. But this Section applied, not to the Courts of the Mofussil, but only to the old Supreme Courts, and the rules and practice prevailing in them. This appears from the words "*such Courts*" used in Section 28, which words must be necessarily read as referring to the Supreme Courts which are specially mentioned in the 27th Section which is immediately preceding. Moreover, the object of Act II. of 1855 was to relax rather than to increase the strictness of the rules of evidence, and it concludes in Section 58 with the following words: "Nothing in this Act contained shall be so construed as to render inadmissible in any Court any evidence which, but for the passing of this Act, would have been admissible in such Court."

The 16th January 1866.

*Present :*The Hon'ble F. B. Kemp and F. A. Glover,
*Judges.***Commitment (Powers of Sessions Judge)—
Assault—Hurt—Grievous Hurt.***Queen versus Ramtohul Sing and others.**Committed by the Deputy Magistrate, and tried
by the Sessions Judge of Shahabad, on a
charge of grievous hurt.*

A Sessions Judge has no authority to interfere and direct a commitment in the case of a conviction for assault under Section 352, or of hurt under Section 323 of the Penal Code, both of them being offences triable by the Subordinate Court.

When the result of a joint attack by several persons on one party is fracture of the arm of the party assaulted, the offence committed is grievous hurt, and not assault; and, as the attack was made in furtherance of a common object, all are equally guilty of the same offence.

With regard to the appeal of Sheonarain, we think that the Sessions Judge, in quashing the Deputy Magistrate's order, and ordering the prisoner to be committed to the Sessions, acted without jurisdiction.

Section 427 of the Code of Criminal Procedure enacts that such an order can be passed only when the conviction is of an offence *not triable* by the Subordinate Court; but in the present instance, Sheonarain was convicted before the Deputy Magistrate of assault under Section 352 of the Penal Code, and punished for that offence, so that, as the offence of which he was convicted was one *triable* by the Subordinate Court, the Sessions Judge had no authority to interfere and direct a commitment. It follows of course that the sentence of ten months' rigorous imprisonment passed upon Sheonarain must be remitted, and the original order of the Deputy Magistrate be restored.

But, on looking at the record of the original case, we observe that the Deputy Magistrate was *prima facie* wrong in convicting Sheonarain under Section 352 of the Code of Criminal Procedure at all.

The action taken by this man appears to have been excessively violent, and the result of the joint attack was fracture of the arm of the assaulted party. Now, as all the accused took part in this attack, and as the attack was made in furtherance of their common object, all were guilty of the same offence, which amounted to grievous hurt.

Although, therefore, we are bound to annul the sentence passed on Sheonarain

by the Sessions Judge on a technical point, we think it is still open to him to refer the Deputy Magistrate's proceedings to this Court under Section 434 of the Code of Criminal Procedure, with a view to their being reversed as illegal, and a new trial ordered.

These remarks apply equally to the case of the appellant Ramtohum. The offence of which he was convicted by the Deputy Magistrate was hurt under Section 323 of the Penal Code, and was one properly triable by that officer, so as to take the case out of the jurisdiction of the Sessions Judge under Section 427 of the Code of Criminal Procedure.

With regard to the remaining prisoner Jeena, we see no reason to interfere; his committal and trial by the Sessions Judge are regular, and on the evidence we think his conviction amply justified.

The 17th January 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, Judges.

Misdirection—Evidence.

Queen versus Choonee and others.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of abetment of robbery.

The omission of a Judge to point out to the Jury the weakness of the evidence against the accused, and the possibility of other persons being the guilty parties, does not amount to a positive misdirection. Where there is some evidence to go to a Jury, the Court cannot interfere. There must be a misdirection or some error in law. The case commented on, however, as unsatisfactory

We have sat together in this case, and have fully considered the appeals of these prisoners, who have been heard by their pleader. We have also heard the Junior Pleader of Government in support of the conviction.

The only point on which we could interfere in this case, which was tried before a Jury, would be that there had been a positive misdirection by the Judge to the Jury, or that there was a total failure of the legal evidence necessary to support the conviction, such failure amounting to error in matter of law.

We cannot term this case by any means a satisfactory one. There is no evidence whatever to show when or by whom the deceased Deokee Ram was murdered or robbed. Indeed, the prisoners have been acquitted of abetment of murder, and have

been convicted of abetment of robbery. The robbery on the charge framed by the Magistrate is stated to have been committed between the Stations of Futwa and Buktiarpore; but there is not a tittle of evidence to show where the deceased was actually murdered and robbed. The stations in question are next in order on the line to the South of Patna City. The evidence goes to show that the murdered man was found dead by the Station Master of Dinapore when he opened the carriage, and that the prisoners had been seen to enter the carriage with the deceased when the same train left Jumalpoore at 10 o'clock on the 10th of December 1864.

The evidence for the prosecution, including that of the chief witnesses, Meetun and Pultoo Singh and others, goes to show that the deceased stayed at Jumalpoore on the night of the 9th of December, having left Burdwan by the 11 o'clock train of that day; that the deceased was escorted to a lodging by the orders of the prisoner Choonee Jemadar, who is employed on the Railway; that the next morning he was advised by the Jemadar not to go up by the day-train as it was much crowded, but to wait for the night-train; that Choonee Jemadar procured him his ticket, and that this prisoner put the deceased into his carriage, together with the three appellants now before the Court. The evidence also shows that the prisoners Pultoo Moodie and Daboo are servants of Choonee Loll. Sheoburt appears to be unconnected with the others, though he got into the same carriage with them. The prisoner Choonee, who is admitted to have never left Jumalpoore, in his defence pleaded enmity on the part of one of the principal witnesses, Pultoo Singh. The other prisoners, Pultoo and Daboo, pleaded that they had never left the Station of Jumalpoore, while Sheoburt gave evidence to show that he had gone up the line to Azimghur, but on a different date.

Of the value of this evidence, which was commented on by the Judge at length, it was wholly for the Jury to decide, and it is clear to us that they must have discredited the defence, as well as that they must have given full credit to the principal witnesses who spoke of the interest taken by Choonee Loll in the movements of the deceased and to the simultaneous departure of the deceased and the prisoners in the same carriage with no one else.

We think that it would have been well if the Judge had pointed out more strongly to the Jury the weakness of the evidence and

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It is our opinion that we cannot interfere, as there has been no misdirection in this instance, and as there was some evidence to go to a Jury, and no error in matter of law has been shown to us.

The appeals must be dismissed.

The 19th January 1866.

Present:

The Hon'ble L. S. Jackson, J. B. Phear,
and F. A. Glover, *Judges*.

Land disputes—Jurisdiction of Magistrate.

Miscellaneous Criminal Appeal.

Dewan Elahee Newoz Khan and Aftabonissa

versus

Suburunissa.

In cases of disputes concerning the possession of land under Section 31 of the Code of Criminal Procedure, the Magistrate has no jurisdiction to interfere unless he is first satisfied of the existence of a dispute likely to cause a breach of the peace.

Glover, J. The argument in this case has been allowed to go far beyond the scope of the petition of appeal. As, however, the points at issue are of considerable importance,

I have no objection to dispose of the appeal with reference to them, as well as to the point specially noted in the petition.

The Deputy Magistrate's order there is declared illegal—

(1.) Because the dispute referred to the right to collect a share of certain rents, and not for possession of any defined portion of land.

2.) Because the parties to the suit are not either of them in actual manual possession of the land in question.

(3.) Because the Deputy Magistrate has not recorded any formal proceeding under Section 318 of the Criminal Procedure Code, stating his grounds for believing that a breach of the peace was likely to occur.

Lastly. The Sessions Judge is declared to be wrong in not hearing the appeal.

The last objection is not very clearly recorded. It is not contended by the petitioner's pleader that there is any appeal, properly so called, from an order of a Magistrate passed under Section 318. So far the Sessions Judge's order on the petition, to the effect that he had no jurisdiction, was correct. The object of the petitioner was apparently to get the Sessions Judge to look into his objections touching the nature of the claim, and to refer the case to the High Court under Section 434 of the Procedure Code. The Sessions Judge, no doubt, mistook the nature of the petitioner's application, but, as the whole case is now before the Court under Section 401, there is no necessity for sending it back for a formal order.

With regard to the allegation that the dispute is for a fractional share of profits of an *ijmaller* property, I think that the appellant has altogether failed to make out his case. The record describes the property, of which possession is sought, as a regularly defined and demarcated shikmee talook, with a specific name, and it is alleged to consist of a $14\frac{1}{2}$ annas share of the parent zemindary. There is nothing to show that the claim was for a share of the rents of an undivided estate. Another point would be that this appeal comes under Section 404. The error complained of must be one of law, and there is no power in this Court under the Section to enquire into the truth of facts found by a Lower Court. Here the Deputy Magistrate has distinctly held that the dispute is not for the share of a talook or mehal, but that the subject of dispute is one entire talook comprising the $14\frac{1}{2}$ annas share of ten mouzahs, and with such a finding I apprehend this Court could not interfere.

Then, as to the *second* objection, I have no doubt that Section 318 refers to and includes all parties concerned in the dispute, "whether" (to use the words of the old law, Act IV. of 1840) "proprietors, dependant talookdars, farmers, under-farmers, ryots, or other persons," and that it is not essential that the parties to such a suit should be or claim to be the actual and manual possessors of the land. The words of the present law are very broad; they are that, when a dispute exists concerning any land, the Magistrate is to call upon *all parties* concerned, &c., &c., and it seems to me impossible to restrict the meaning of the word *all* to the narrow limits of resident cultivators. It appears fairly and consistently to include all the parties mentioned in Section 2, Act IV. of 1840. That Act was framed to enlarge the provisions of the old law on the subject, Act XV. of 1824, which restricted the Magistrate's interference to cases where proprietors of land were concerned; and, had Act XXV. of 1861 been intended to reduce the law's action to narrower limits, doubtless Section 318 would have distinctly said so. So far from doing that, it appears to me to follow the meaning of Act IV. of 1840, and to use the same form of words, *viz.*, "all persons concerned in such dispute."

I am of opinion, therefore, that the present case was rightly brought under Section 318.

Lastly, as to the Deputy Magistrate's omission to record any formal grounds for apprehending a breach of the peace.

Strictly speaking, the objection does not apply to the Deputy Magistrate's proceedings at all, but to those of his immediate superior who ordered the case to be brought under Section 318, and sent to the Deputy Magistrate for enquiry into the fact of possession; but, taking it in its broadest sense, I do not think that the Magistrate's omission to record in a separate statement his reasons for believing a breach of the peace likely is sufficient to nullify the Deputy Magistrate's subsequent action. It is nowhere required by the law that the officer directing an enquiry under Section 318 should himself take or record evidence on the subject; he is merely to be satisfied "that a dispute likely to induce a breach of the peace exists," and to state the grounds of his being so satisfied. Now, in the great majority of instances, these grounds would be the reports of the police officials, who had visited the spot, and had seen the preparations for a riot or unlawful assembly; and, were the Magistrate to record them, they would, in all probability, be

written in almost the very words used by the police. It appears to me, therefore, although I admit the proceeding to be irregular and deserving of blame, that a Magistrate endorsing a police officer's reasons for apprehending a breach of the peace by stating his concurrence in them, and ordering in consequence an enquiry under Section 318 is sufficiently within the meaning of that Section to prevent an Appellate Court's annulling his order for illegality. Though not in strict rule, the Magistrate's proceeding carries out the intention of the law, which is that the officer trying a case or directing it to be tried under the above Section should be himself responsible for taking the matter out of the usual course of law on the ground that by doing so he was preserving the Queen's peace.

For these reasons I would reject this application, and uphold the order of the Lower Court.

Phar, 7. I am of opinion that this application should be granted.

Had it not been for the strongly expressed opinion of Mr. Justice Glover, I should certainly have been disposed to think that the "possession of land, &c.," contemplated in Section 318 of the Criminal Procedure Code, was (as the Section itself expresses it) "actual" possession, and not constructive possession by the receipt of rents. It seems to me that the breach of the peace intended to be anticipated is something in the way of a personal struggle for the actual enjoyment of the immoveable property described, and, had I been unassisted, I should have considered that the ordinary sense of the words employed supported that view and no other. It would not have occurred to me that the directions given in the earlier Act to assemble at the enquiry all the various proprietors, &c., concerned in the dispute, so far enlarged the other words of the Act as to indicate that the Peace Officer was to deal with any thing beyond a local and tangible subject of quarrel. If "possession" is here intended to embrace any meaning beyond that which involves direct enjoyment of the subject, there is nothing to confine the occurrence of the dispute and consequent breach of the peace even to the neighbourhood of the immoveable property which defines it, and, in that case, it is difficult to imagine why the Legislature should consider it necessary to distinguish violent disputes about rights of immoveable property from those in which questions as to rights to moveable property have inflamed the passions of the parties.

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But, whatever might be the conclusion to which further and mature consideration might lead me on this point, I think the Magistrate has no jurisdiction to enquire into the matter of possession at all, unless he is first satisfied that a breach of the peace is actually likely to occur in reference thereto. It necessarily follows that he must adjudicate definitely upon this point, and the Legislature also adds that he must record his reasons for being so satisfied. In this case he does not appear to have done either of these things. Perhaps it might be immaterial to the validity of the proceeding before him whether or not he finally recorded his reasons as directed by the Act; but, as the imminence of a breach of the peace constitutes the substantial ground for his interference being involved at all, it ought, in my judgment, to be distinctly adjudicated upon by him. So far is this, which I consider to be a requirement of law, from being fulfilled that the Deputy Magistrate does not even allude in his decision to a breach of the peace. The document which exhibits his judgment is headed as if the case were a civil suit between parties, and certainly the inference from the passage, which suggests itself to my mind, is that the proceedings before the Magistrate were conducted as a piece of private litigation without any reference whatever to the main purpose of the Legislature. I think we are specially bound in this country to take care that the action of our Courts of limited jurisdiction is not diverted from its proper end, and is not in any way made to pander to the unhealthy craving of the people for litigious contest. Moreover, I may add that, in this particular instance, not only is there no adjudication on the point, but I cannot gather from the facts disclosed that there was any real ground for apprehending a breach of the peace. The reports of the police officers distinctly negative the allegations made by the complainant with regard to it, and only say that the dispute was one which might not improbably lead to a breach of the peace. As much might truly be said of almost any dispute whatever between persons belonging to the classes of society who are the less accustomed to self-restraint, and if it is sufficient to support the jurisdiction of the Magistrate under Section 318 of the Code of Criminal Procedure, I am at a loss to conceive why the Legislature should desire the reasons which satisfy the Magistrate to be recorded.

THE CASE WAS ON BEFORE A THIRD JUDGE

Jackson, J.—I concur with Mr. Justice Phear to this extent that, as the root of the Magistrate's jurisdiction in cases under Section 318 of the Code of Criminal Procedure is the necessity of preserving the public peace, and, as the Legislature has made it a condition precedent to his interference in such cases that he should be satisfied of the existence of a dispute likely to occasion a breach of the peace, the proceedings in this case are defective, as it does not appear, in the face of them, that the Magistrate or any Magistrate was so satisfied.

Various parties presented petitions to the Magistrate of the district, inviting his interference, and the police officers made reports, in which it was stated that a disturbance was probable. On this the Magistrate appears to have passed an order, directing a Subordinate Magistrate to place the case on the file, and proceed under Section 318.

From this it is not clear whether the Magistrate intended anything more than that the Subordinate Magistrate should proceed to hold the enquiry, if he were satisfied that a breach of the peace was likely to occur.

At any rate, it does not appear from the record that either the Magistrate of the district or the Subordinate Magistrate was actuated by that belief, which, I think, is essential to authorize his interference.

I am very strongly of opinion that it is of the highest importance to restrict the action of the Criminal Courts in their interference with property to the cases in which such interference is expressly authorized by law.

And for this reason I concur in setting aside the order as made without jurisdiction.

It does not appear to be necessary that I should record my opinion on the other points raised in the judgment of my learned colleagues.

The 20th January 1866.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges*.

Transportation (Term of—under Sections 412 and 59, Penal Code).

Queen versus Mohanundo Bhundary and others.

Committed by the Deputy Magistrate, and tried by the Officiating Sessions Judge of Beerbhoom, on a charge of dacoity.

A sentence of transportation under Sections 412 and 59, Penal Code.

Seton-Karr, J.—I see no reason whatever to distrust the judgment of the Court and the Assessors in this case.

There was every probability of the woman Ahladi's recognizing the prisoner Bipun, and the evidence as to the finding of the stolen property as against the other prisoners seems quite full and conclusive.

I doubt, however, whether under Sections 412 and 59 the prisoner Ramesur can be sentenced to 14 years' transportation. Section 59 says that the transportation is not to be less than seven years, nor more than the term for which the prisoner would be liable to imprisonment. Now, by Section 412, the imprisonment can only extend to 10 years. Therefore, it seems to me that the transportation commuted under Section 59 cannot be more than 10 years.

I would reduce the punishment of Ramesur to 10 years' transportation in this view of the law.

The other appeals are rejected.

Macpherson, J.—As the sentence of 14 years' transportation above referred to is expressly stated to be given under the two Sections 59 and 412, I concur with Mr. Justice Seton-Karr in thinking (for the reasons assigned by him) that the sentence must be reduced to 10 years' transportation.

The 23rd January 1866.

Present :

The Hon'ble G. Campbell, *Judge*.

Judgment of Judge—Grounds of commitment—Evidence.

Queen versus Ishur Manjee and others.

Committed by the Magistrate of Bancoorah, and tried by the Sessions Judge of West Burdwan, on a charge of dacoity.

A Judge is bound to state in his judgment the evidence on which he convicts. The evidence in this case commented on, as well as the omission of the Magistrate to give in the grounds of commitment any particulars of the case.

I do not consider that this case comes before this Court in the shape in which it ought to come. I think that the Judge is bound to state in his judgment the evidence on which he convicts the prisoners. He merely says: "It is beyond doubt that a dacoity occurred, and that the prisoners, each and all of them, took part in the offence." The judgment then goes on to give an extraordinary, and, to me, unintelligible reason for not coming to any finding as respects the

more serious charges of dacoity with grievous hurt, and in fact formally acquits the prisoners on those charges. It seems to me that, if one word of the evidence is to be believed, and any offence at all was committed, it was dacoity with grievous hurt under Section 397 of the Penal Code, and that not only prisoner No. 1 (who, according to the evidence, struck the blow), but all the other prisoners, members of an unlawful assembly, prosecuting a common object, were guilty of that offence (not of abetment of it as charged by the Magistrate) under Section 149. The Judge says: "There is no direct proof that the mother of Bholanath sustained grievous hurt, and there is no necessity, &c., when, in fact, there was the evidence of the woman herself and of the other witnesses, of the Civil Surgeon (examined before the Magistrate, and sent to the Judge, but not examined by him); in fact, I do not see what evidence could have been more direct. Then the Judge thought fit to omit to examine some of the witnesses sent up by the Magistrate, though, as they are entered in the Calendar, it seems to me that Nos. 9 and 10, who did not profess to recognise the dacoits, but heard the cries, would have been important as impartial witnesses to certify whether the more direct witnesses to recognition mentioned the names of the dacoits at the very moment, and the witness, No. 11, who is said to have recognised the dacoits, was especially important, not being the prosecutor's witness, but (it would appear) a person sent for at the instance of the prisoner's mooktear. Again, the Judge ought in such a case invariably to insist on the attendance of the police witnesses, who could testify to the manner in which the property was discovered, and the confessions, &c., obtained. And the Magistrate should always send such witnesses when, as in this case, their evidence is important. The evidence against the prisoners consists in—

1. —Witnesses to recognition at the time of the dacoity.

2. Some small articles of property said to have been found in the house of No. 1.

3.—The partial admission of the prisoner No. 7.

The police ought to have proved that the complainant named the prisoners from the first, how and under what circumstances the articles of property were recovered (the finding is only proved by a formal witness called for the purpose), and how the admission was obtained; this is not shown at all.

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Notwithstanding, however, the omissions mentioned above, I find that the first police-reports (though not properly proved as they should have been) do not mention the names of the prisoners; that the witnesses examined swear very positively to the recognising of the dacoits; that there is some evidence, such as it is, to the finding and identity of the property, and that the admission of one of the dacoits was recorded at the time before the Deputy Magistrate; that the prisoners have not set up or proved any good defence, and that, with the exception of Boro Nuddea Manjee, No. 2, to be presently noticed, they do not allege any good ground of appeal before me.

That being so, and the prisoners being convicted of dacoity by the unanimous verdict of the Judge and Assessors, I do not see sufficient ground for interference in this case, and dismiss the appeal of all the appellants, except Boro Nuddea Manjee, No. 2.

Boro Nuddea Manjee urges that he is a leper, and physically incapable of committing the offence alleged against him; and he appeals to his physical appearance. He seems to have made the same defence before the Judge, but the Judge omits to notice it. I therefore think it necessary to call on the Judge to certify whether in his opinion the prisoner is or is not physically capable of the offence imputed to him.

I must add that I notice defects in the investigation prior to its trial at the Sessions. I cannot understand why it is that, with so highly paid a police force, the most important cases are so often left to inferior officers. This case of dacoity with serious wounding was only investigated by a subordinate police officer called by the witnesses the Bukshee, that is, I suppose, one of the old Mohurrirs dressed in uniform as a head constable; and I must again bring to the notice of the Judge of the English Department the wide-spread practice of sending away the witnesses from the Magistrate's Court till a more convenient season, so as to preserve the shadow without the substance of rapid disposal of business. In this case the witnesses were sent in on 24th September, but the Deputy Magistrate, Alla Mahomed, sent them away again for a time, without any examination whatever. They were sent in a second time, and examined for the first time on 5th October.

The Magistrate also seems to omit to give in the grounds of commitment any particulars of the case. He should then make an official record of the circumstances and evidence by which, and the dates when,

the case was brought to light, and should, in fact, render his grounds of commitment a proper and complete act of accusation.

The 25th January 1866.

Present:

The Hon'ble F. B. Kemp, W. S. Seton-Karr, and L. S. Jackson, *Judges*.

Evidence—Accomplice.

(Queen versus Dwarka.

Committed by the Officiating Magistrate of Monghyr, and tried by the Sessions Judge of Bhaugulpore, on a charge of abetment of murder, &c.

The testimony of an accomplice is not alone sufficient for a conviction. The corroboration must be on matters directly connecting the prisoner with the offence of which he is accused; and the evidence of two or more accomplices requires confirmation equally with the testimony of one.

HAVING considered this case together, we find that the Sessions Judge has convicted the prisoner, appellant, upon the evidence of two accomplices, which evidence, as to the appellant's participation in the crime, is not in any way corroborated.

We think that the rule by which our Courts of Criminal Jurisdiction must be guided is that the testimony of an accomplice is not alone sufficient for a conviction; that the corroboration must be on matters directly connecting the prisoner with the offence of which he is accused; and that the evidence of two or more accomplices requires confirmation equally with the testimony of one.

We observe that, in this case, if the evidence of the accomplice-witnesses be true, the prisoner has taken part in a deliberate and atrocious murder for the meanest motives, and, if he be guilty, it would be against the interests of justice that he should escape.

It appears to us that, if the accomplices have told the truth, a little inquiry ought to lead to the obtaining of evidence by which their testimony might be confirmed.

We direct, therefore, under Section 422 of the Code of Criminal Procedure, that the Court of Session shall make enquiry whether the prisoner is known to have associated with the accomplices, or with the man Gurbhoo who has been hanged for this crime, or whether he is known to have frequently absented himself from his house about the time of the commission of this crime without legitimate cause, whether he was

seen at the place where the deceased men were poisoned, or where the poison was bought about the time of the transaction; and that the Court shall receive such evidence as may be offered on the part of the prosecution upon these or other points bearing upon the guilt of the prisoner.

After recording such evidence with all the precaution which the peculiar circumstances of the case will suggest to the Judge, and allowing the prisoner to allege any thing, or bring any counter-evidence which he may have to offer, the Judge will return the proceedings to this Court for final orders.

The 26th January 1866.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

**Conviction and sentence on several charges—
Rioting—Hurt—Grievous Hurt.**

Queen versus Azgur and others.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of riot being armed with deadly weapons, &c.

Conviction and sentence both for rioting and for grievous hurt upheld, the punishment being on the whole not more severe than might properly have been awarded, if the conviction had been for grievous hurt only.

A person convicted of rioting should not be convicted of hurt or grievous hurt caused to himself.

In this case fifteen prisoners have been found guilty, *1st*, of rioting being armed with deadly weapons; *2nd*, of causing grievous hurt by means of an instrument for stabbing or cutting; and, *3rd*, of causing hurt by the like means. On the conviction for rioting, they have been sentenced to three years' rigorous imprisonment each; on the conviction for grievous hurt, two, namely Azgur and Roshundee, have been sentenced to an additional term of two years' rigorous imprisonment, while all the others have been sentenced to one additional year. No punishment is awarded on the conviction for causing hurt, the punishments given under the other heads being deemed sufficient.

There is no question as to the propriety of the finding of fact as to the riot, and as to one of the prisoners, Fukeer Mahomed, having been hurt "grievously," and as to another prisoner, Ahmed Ally, having been hurt in the riot.

The prisoners appeal, all of them, on the general ground that, as they were all convicted of the riot, they ought not also to have been found guilty on the other counts. But we think there is nothing legally wrong in the convictions, as the rioting did not necessarily lead to grievous hurt, and as the causing of grievous hurt was in respect of one person, while the causing of hurt was in respect of another. Moreover, the sentences are not in the whole heavier than might properly have been inflicted, had they been found guilty of causing grievous hurt alone.

Fukeer Mahomed and Ahmed Ally, the two prisoners who were hurt, have, however, a very substantial ground of objection to the convictions and sentences as to them. They have, no doubt, been rightly found guilty on the first count for rioting. But, as Fukeer Mahomed is himself the person to whom the grievous hurt with which the prisoners were charged was caused, it seems somewhat absurd, and it is wholly inconsistent with justice, that he should be found guilty of the offence of causing that grievous hurt. His conviction and sentence under the second count of the charge (*viz.* for causing grievous hurt, &c.) are quashed and set aside. In like manner, as Ahmed Ally is himself the person to whom the hurt which is the subject of the third count was caused, it is absurd to find him guilty of the causing of it. He is not sentenced under that count, but it is impossible for us to say how far his conviction under it may have influenced the Judge in his fixing the sentence under the second count; and, as he is sentenced to a long period of imprisonment for the offence of rioting, we think that the sentence passed on him in the second count (for causing grievous hurt) should also be set aside.

As regards the other prisoners who have appealed, the appeal is dismissed.

The 30th January 1866.

Present :

The Hon'ble A. G. Macpherson, *Judge.*

Robbery—Extortion.

Queen versus Dulcelooddeen Sheik and Jameer Faqueer.

Committed by the Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of extortion.

Where a person through fear, &c., offers no resistance to the carrying off of his property, but does not deliver any of the property to those who carry it off, the offence committed is robbery, and not extortion.

Feb. 7. In this case I do not think that the facts found warrant a conviction for *extortion*, inasmuch as, although the boatmen through fear offered no resistance to the prisoners carrying off their property, they did not deliver any of the property either to the prisoners or to any one else. Delivery by the person put in fear is (according to the definition contained in Section 383 of the Penal Code) essential in order to constitute the offence of extortion. I think the prisoners ought to have been convicted of (as they were charged with) *robbery*; for the facts found clearly amount to robbery within the definition contained in Section 390. The prisoners, in order to the committing of theft, voluntarily caused, or attempted to cause, fear of instant wrongful restraint to the persons whose property they took. They stopped the prosecutors' boat in the stream, represented themselves to be persons in authority, and said that the boat must be taken to Rampore Beaulah, where it was required by the Magistrate to carry treasure, and then they plundered the boat. In this there undoubtedly was the causing, or attempt to cause, fear of "wrongful restraint," which is (Section 339) defined to be the voluntarily obstructing "any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed."

Under Section 426 of the Criminal Procedure Code, however, I shall not reverse or alter the sentence of the Lower Court, because the persons accused have not been sentenced to a larger amount of punishment than could and ought to have been awarded for the offence of which, in my judgment, the accused ought, upon the evidence, to have been found guilty. The accused have been, in no way, prejudiced by the error.

The appeal is dismissed.

The 27th January 1866.

Present :

The Hon'ble G. Campbell and A. G. Macpherson, *Judges*.

Murder—Capital Punishment.

Queen versus Khoaz Sheik.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Sylhet, on a charge of culpable homicide amounting to murder, &c.

The punishment of death should not be inflicted in a case where there was no intention to cause death, but merely a reckless assault with a deadly weapon, which inflicted a bodily injury likely in the ordinary course of nature to cause death.

WHATEVER suspicion we might have, that the witnesses who were, they say, beaten for calling *dohai* were not so disinterested spectators as they represent themselves, and that the affair may not have been so entirely one-sided as it is represented; still, when prisoners make no substantial defence, but set up false *alibis*, it is very difficult to say that the evidence for the prosecution is false, and in this case we cannot take upon ourselves to disturb the finding of fact of the Assessors and the Judge that the prisoner, whose case is referred to us, having had a quarrel with deceased, did afterwards, having obtained the assistance of others, make an entirely one-sided assault on the deceased. If that be so, and if, looking to the character of the weapon, and the whole circumstances of the assault, it is rightly found that the prisoner intended to inflict such bodily injury as he knew to be likely to cause death, and he did inflict a bodily injury sufficient in the ordinary course of nature to cause death, and which, in fact, did cause death; then, no doubt, the prisoner is guilty of murder. We see no sufficient reason to do otherwise than to accept the finding of the Sessions Court on this point. But we do not think that such a case as this, in which there was no intention to cause death, but merely a reckless assault with a weapon which inflicted a bodily injury likely in the ordinary course of nature to cause death, *viz.*, a club of a very lethal character, is one in which the last punishment of death is at all proper. We deem it more consistent with justice to sentence the prisoner Sheik Khoaz, and do sentence him, to transportation for life. Several other prisoners who did not strike the fatal blow were at the same time convicted of murder, and sentenced to transportation for life, a sentence which seems extremely severe, but which is the lowest lawful sentence, if the prisoners are rightly convicted of murder. As no appeal from the prisoners is before us, and the exact limits of the offence of murder has been the subject of discussion before a Full Bench of this Court, whose judgment has not been delivered, we do not at present think it desirable to exercise our general power of revision in regard to these prisoners, deeming that such power should only be exercised when there is clearly error.

The 31st January 1866.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

**Criminal Breach of Trust—Deficit of Salt in
Salt Golahs.**

Queen versus Brinbadhur Putnaik.

*Committed by the Officiating Magistrate, and
tried by the Sessions Judge of Cuttack, on a
charge of criminal breach of trust.*

The mere fact of there being a large deficit of salt, without distinct proof of a criminal misappropriation, is not sufficient to convict the Salt Darogah in charge of the golahs of criminal breach of trust under Section 409 of the Penal Code.

Glover, J.—THE prisoner in this case, a Salt Darogah in Cuttack, has been convicted under Section 409 of the Penal Code of criminal breach of trust, &c., and sentenced to three years' imprisonment with a fine of 10,000 rupees.

The facts of the case have been given in very full detail by the Sessions Judge, and it is only necessary for me to state shortly, that the prisoner was admittedly in charge of the Booreah Salt Golahs, three in number, from 1861 to 1865, the period during which he was on leave excepted; and that there is a very large deficiency of salt to be accounted for. Such deficiency, however, would not *per se* render the Darogah criminally liable; there must be distinct proof of a criminal misappropriation of some part of the missing salt before the prisoner can be convicted under Section 409.

Before considering the evidence on this point, I must correct a mistake of the Sessions Judge in respect of the quantity of salt said to have been damaged by the fire. The Sessions Judge has held, and the circumstances seems to have had great weight with him in determining the question of the prisoner's guilt, that the Salt Agent's Sheristadar, who went to inspect the Golahs, reported that not above 100 maunds were damaged by the fire, and that the Darogah never objected to that report. I have read this report (dated 9th June 1864) carefully, and do not find any such estimate. The Sheristadar describes the appearance of the Golah—the posts of which were then burning—and states that he could not say what amount of injury had been done, but that the salt was disclosed to various depths in all directions. He nowhere in his report estimates the loss at 100 maunds, and therefore the Sessions Judge's presumption against

the prisoner in consequence of his omission to object to that report at once falls to the ground. In connection with this part of the case I may remark that the fire took place during the prisoner's absence on leave, and that, directly he returned, he reported very strongly to the Agent the necessity of having the salt removed from the golahs, and reweighed in order to ascertain the extent of the damage. He even refused to take charge or give out salt on *rowannahs* until this was done, and only yielded after the repeated orders of his superior. Looking to this portion of the evidence, I think the prisoner is fully cleared from all suspicion of laches; from the time of his return, till peremptory orders from the Salt Agent rendered it useless, he kept continually remonstrating against being made responsible for losses, the extent of which had not been ascertained.

The particular charges on which the prisoner has been convicted arose in this way. When the Darogah reported two of his Golahs empty, the Sheristadar (witness No. 1) was sent down to make enquiry, the deficiency amounting to several thousand maunds of salt. In the course of it, his attention was directed to a fleet of salt boats lying at a ghât within a couple of miles of the Golahs, and in seven of these he considered that the cargo was not properly protected.

Of these seven three belonged to one Jogee Behara, and on board were 700 maunds of salt. Jogee Behara produced two *rowannahs*, one in his own name for 621 maunds, and one in the name of Bhugwan (alleged to be his brother) for 99 maunds. These two *rowannahs* more than covered the quantity of salt on board, but the Sessions Judge has held it not to have been protected, because Jogee Behara's *rowannah* was post-dated: the document, that is to say, was dated the 31st July, whilst the visit of the Sheristadar took place on the 30th. It does not appear to me how the post-dating of the *rowannah* proves any criminality on the part of the Darogah, or how it can shew that the salt in Jogee's boats was improperly come by. No doubt, it was a circumstance demanding enquiry, but the explanation given by the Darogah, though not exonerating him from the charge of carelessness and impropriety, seems to me, as it did to the Assessors, natural and probable. He says that, as there were still some remaining old form *rowannahs* to come in, he wished to keep the new forms, such as had been presented by Jogee Behara, back for a few days until all the old ones had been entered; for this reason he post-

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Vol. V. dated Jogee's papers to the day when he calculated he would be able to enter them in his books, and in the mean time kept a separate account. This last part of his story is, at all events, borne out; for amongst the papers given up to the Sheristadar were receipts on the part of Jogee and Bhugwan for the salt delivered to them; and there can be no doubt, I think, that the salt found on the three boats of Jogee Behara had been properly received from the Darogah, and was regularly protected.

The same remarks apply to the boat owned by Schoodass. This party held a *rowannah* for the quantity of salt found on board. The only circumstance of suspicion against it was the post-dating of the *rowannah* to the 31st of July; for the reasons already given, I think that the Darogah's explanation may be received.

Two other boats belonged to Juggobundoo, and one to Muddoo. *Rowannahs* were produced (after some little delay, the owners apparently not being on the spot) to cover the salt. The Sessions Judge mistrusts all these documents: in Juggobundoo's case, because the *rowannah* he produced was not in his own name; and in Isshur's and Muddoo's cases (Isshur, I would mention, was said to own part of the salt in Juggobundoo's boat), because the dates of delivery were many days anterior.

I do not see how the fact of Juggobundoo's boat containing salt covered by a *rowannah* in another person's name proves anything at all against the Darogah. If it were the rule, that parties taking *rowannahs* from a Salt Agent were bound themselves to take delivery of the salt mentioned in them, their neglect of this rule would not affect the Salt Darogah. He was bound to deliver the salt to the holder of the *rowannah*, and, having done that, he was *functus officio*.

Then, as to the suspicion supposed to arise from the dates of delivery in the case of these two persons, it is proved by the evidence of the boatmen that, for some days at least after Juggobundoo's salt was given out by the Darogah, it remained heaped up on account of some repairs which had to be done to the boat, and that, after these were finished and the salt put on board, the boat remained a week or more at the ghât before it was seized by the police. As to Isshur's salt no such doubt could arise; for he does not appear to have taken delivery of it till the 28th.

The same remarks apply to Mudhoo's boat. He produced a *rowannah* for his salt, and

the mere fact of his having taken delivery some 10 days before, cannot invalidate that document, or prove that the salt seized in his boat was not the salt protected by his *rowannah*.

In short, taking all the evidence into consideration, I think that the case for the prosecution breaks down altogether. No act of criminal breach of trust is proved, and the mere fact of there being a large deficit, although it may make the prisoner civilly liable, cannot bring him within the provisions of the Penal Code.

I would reverse the Sessions Judge's order and sentence, and direct the release of the prisoner.

Kemp. J.—I entirely concur in this judgment. There is no evidence of a dishonest misappropriation of trust property, and the prisoner must be acquitted.

The 31st January 1866.

Present:

The Hon'ble C. B. Trevor, L. S. Jackson, and F. A. Glover, *Judges*.

Appeal—Convictions under Police Act V. of 1861.

Referred under Section 434 of the Code of Criminal Procedure, and Circular Order No. 18, dated the 15th July 1863.

Thakoor Doss and Godai Shek.

Convictions under the Police Act V. of 1861 are appealable like other convictions. Where the appellants are convicted by an officer exercising the powers of a Magistrate, and sentenced to imprisonment exceeding the limit prescribed by Section 411 of the Code of Criminal Procedure, the appeal lies to the Sessions Court.

We think it clear that convictions under Act V. of 1861 are appealable in the same way as other convictions.

Section 21 of the Code of Criminal Procedure provides that "the Criminal Courts of the several grades, according to the powers vested in them respectively by this Act, shall have jurisdiction in respect of offences punishable under the Indian Penal Code, or under any special or local law, and in the investigation shall be guided by the provisions of this Act."

Act V. of 1861 is a special law on the subject of police: and persons charged with offences punishable under that law must be tried under the provisions of the Code of Criminal Procedure.

Section 409 of the same Code provides that any person convicted on a trial held by the Magistrate of the District, or other officer exercising the powers of a Magistrate, may appeal to the Court of Session to which such Magistrate is subordinate (subject to the limit prescribed in Section 411).

The appellants in this case are persons convicted on a trial held by an officer exercising the powers of a Magistrate, and sentenced to imprisonment exceeding the limit fixed by Section 411. They were, therefore, we think, entitled to an appeal to the Sessions Court. We, therefore, direct the Sessions Judge to hear the present appeal, and to pass such orders as the circumstances may require; and we further direct that a copy of this decision be laid before the Judge in the English Department.

The 7th February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, Chief Justice, and the Hon'ble H. V. Bayley, J. P. Norman, Shumbhoonath Pundit, and G. Campbell, *Judges*.

Evidence (in cases of Perjury)—Single witness—Corroboration.

Queen versus Lal Chand Kowrah Chowkeदार and others.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of giving false evidence, &c.

Held by the majority of the Court (Campbell, J., dissenting) that the evidence of one witness uncorroborated not legally sufficient for a conviction of perjury.

Peacock, C. J.—THE question which has been referred to this Court in the present case is whether a person can be convicted of perjury in the Mofussil upon the evidence of a single witness uncorroborated. Section 28 of Act II. of 1855 lays down a general rule in the following words: "Except in cases of treason, the direct evidence of one witness, who is entitled to full credit, shall be sufficient for proof of any fact in any such Court or before any such person." But the rule is subject to a proviso in the following words: "But the provision shall not affect any rule or practice of any Court that requires corroborative evidence in support of the testimony of an accomplice or of a single witness in the case of perjury."

It is said that Section 28 does not extend to the Mofussil Courts, and that

it applies only to the High Court on its Original Side, inasmuch as the Act was intended to apply only to Her Majesty's Supreme Courts. That depends upon the construction which is to be put upon the words in the general rule laid down in Section 28, "in any such Court," or "before any such person." Now, it so happens that Section 27, which immediately precedes the Section in question, says: "The rules of evidence in Her Majesty's Supreme Courts as to matters of Ecclesiastical or Admiralty Civil Jurisdiction shall be the same as they are on the plea side of the said Courts; and it is argued from that, that when Section 28 uses the words "in such Court," it means in any such Court as is lastly abovementioned, *viz.*, Her Majesty's Supreme Courts. But it appears to me that that construction is not correct. Section 27 was not intended to alter the rules of evidence in every branch of the Supreme Courts, but only to make the rules of evidence in matters of Ecclesiastical or Admiralty Civil Jurisdiction the same as those on the plea side of the said Courts. That was the sole object of Section 27, and it did not apply to matters of Criminal Jurisdiction. But Section 28 applies to cases of treason and perjury, and to all cases of every kind; and it appears to me that the words "before any such Courts" were intended to refer to all Courts of Justice in territories then in the possession and under the Government of the East India Company as mentioned in Section 2 of the Act. The words "or before any such person" cannot refer to persons mentioned in Section 27, as no persons are mentioned therein. They, in like manner, refer to the persons mentioned in Section 2, *viz.*, all persons having, by law or consent of parties, authority to take evidence." Sections 3, 5, 7, 11, and other Sections use the words "all such Courts and persons aforesaid;" and Sections 6, 9, 12, and other Sections use the words "all such Courts and persons aforesaid," referring to the Courts and persons mentioned in Section 2. The Act was passed for the improvement of the law of evidence, not only in the Supreme Courts, but in all the Courts of the country. Neither the Title nor the Preamble limit the Act to the Supreme Courts.

If the words "such Courts" in Section 28 refer to the Supreme Courts, because those were the Courts last mentioned; Sections 30, 41, and 45, which use the words "such Court or person," must, upon the same reasoning, be constituted to refer to the Supreme Courts. The Act recites that it is expedient further to improve the law of evidence, and then pro-

Or. 37.

Vol. V. ceeds to enact that, "within the territories in the possession and under the Government of the East India Company, all Courts of Justice, and all persons having, by law or consent of parties, authority to take evidence, shall take judicial notice," &c.

Further, the Proviso under Section 28 shows that "any such Court" was not intended to refer simply to the Supreme Courts. It says, "but this provision," that is, the provision that the evidence of one witness, who is entitled to full credit, shall be sufficient for proof, "shall not affect any rule or practice of any Court that requires corroborative evidence in support of the evidence of an accomplice or of a single witness in the case of perjury."

Now, the words "of any Court" would not have been used in the proviso of the preceding part of the Section, had they been intended to apply only to the Supreme Courts; whereas, if my construction is correct that the words "such Courts" and "such person" refer to the Courts and person mentioned in the 2nd Section of the Act, the words "of any Court," &c., are applicable and correct. According to the law as administered in the exercise of Original Criminal Jurisdiction, the evidence of only one witness uncorroborated is not sufficient to convict of perjury, because it is governed by the rules of the Law of England. I do not mean to say that every rule of the law of evidence, as administered in England, applies to the Mofussil. But I cannot think that we ought to put such a construction upon Section 28, Act II. of 1855, as would allow a person to be convicted of perjury at Allipore or in other parts of the Mofussil upon the uncorroborated testimony of a single witness, when such evidence would be insufficient for a conviction in Calcutta before the High Court in the exercise of its Original Criminal Jurisdiction. Such a construction would not be very consistent. But, if the law is so, we are bound by it. If there was any rule or practice in the Sudder Court or in the Courts in the Mofussil which, before Act II. of 1855, prevented a conviction for perjury upon the evidence of a single witness without any corroboration, it appears to me that such Courts fall within the proviso in Section 28. Now, there is a case which was decided by Mr. Samuells in the Sudder Court (*see Nizamut Reports, Vol. IX., p. 212, Government versus Goreeb Peada*) in which the rule was laid down as follows: "Perjury is not to be assumed, because the story of one man appears to be more credible than that of another. There

must be certain proof adduced, independent of the oath of one of the parties, that the deposition of the other is false." That is to say, the oath of one man is not sufficient to convict another of perjury, when he has sworn to the contrary that you are not to take the evidence which by an accident is the more credible for the purpose of convicting of perjury, but you must bring something corroborative, or something more than the evidence of one witness. This rule, which was laid down by the Sudder Court in the case, is supported by other cases, and is in accordance with the principle of the English Law. Indeed, I think, I may safely say that it was the practice of the Sudder Nizamut and of the Mofussil Courts not to allow a conviction of perjury upon the uncorroborated evidence of a single witness. Consequently, the case does not fall within the general rule of Section 28, inasmuch as it is taken out of that rule by the provision which says that the rule is not to affect any rule or practice of any Court that requires corroborative evidence of a single witness in a case of perjury.

We do not sit here to make the law, nor to exercise the functions of Legislators, but to administer the law as in our consciences we believe it to exist. It is unnecessary, therefore, to enquire whether the rule of English Law or the rule or practice of the Mofussil Courts are founded upon sound and correct principles or not.

Bayley, J.—In this case of perjury referred by Messrs. Justices Norman and Campbell, I would distinctly confine myself to the case as one of perjury. The question then is, whether, when *A* has deposed one way, and *B* has deposed exactly the contrary, and upon this *B* is accused of perjury, the statement of *A* on oath, which is one statement against that of *B*, also on oath, will require some corroboration before *B* can be convicted of perjury. I think that the principle laid down in the decision of Mr. Samuells, in the case in page 212, Vol. IX. Nizamut Adawlut Reports, is that which should be followed. That case is very analogous to this. The principle I would follow here is enunciated in the words underlined:—

"The conviction which is founded simply on the oath of the persons accused by the prisoner cannot stand. If I were to affirm such a conviction, no person bringing a charge against a Darogah, who happened to enjoy the good opinion of the Judge and Magistrate of that district, would be safe. *Perjury is not to be assumed, because the story of*

me man appears to be more credible than that of another. There must be certain proof adduced, independent of the oath of one of the parties, that the deposition of the other is false."

As I said before, the case before us is a case of perjury, and therefore I would not go beyond it or enter into any other question of the construction or application of Act II. of 1855 irrespective of this case of perjury.

Norman, J.—This is an appeal from a conviction before Mr. Pigou, the Judge of Hooghly.

The prisoner Lal Chand was convicted and sentenced to three months' imprisonment under Section 193 of the Penal Code, on a charge of giving false evidence in a stage of a judicial proceeding, by falsely asserting to the Joint Magistrate that he had not told the Inspector of Police that he had taken bamboos from Kartick Ghose, Rakhal Sahee, and others.

The proceedings before the Joint Magistrate shew that a charge was pending before him against one Nissa Ahmed, the Head Constable of Kulsinee, to whom a sum of money had been entrusted for the purpose of building a hut, that he had obtained materials without paying for them. The prisoner stated before the Joint Magistrate, "I received from the head constable the price of all the bamboos I collected. I did not tell the Inspector that I received bamboos from Kartick Ghose, Rakhal Sahee," and others named.

The evidence of Inspector Cavanagh is as follows:—

"I was investigating the conduct of the Kulsinee head constable regarding the accounts of the zemindary dāk building at Nobogram. I remember that the prisoner told me that he had collected some bamboos for the purpose of that building. Lal Chand told me the names of certain persons from whom he had received some bamboos. I don't remember the names he mentioned, but I wrote them down from his mouth at the time in a memorandum." Producing Memoranda A. and B., he says: "These are the memoranda I wrote with my own hands." Refreshing his memory from them, he said: "Lal Chand told me he received bamboos from Kartick Ghose, Rakhal Sahee, and others. I took the names down at the time in my memoranda as the prisoners mentioned the names. They of their own accord gave the names. I am quite certain that this is the prisoner who made the asser-

tion. I am quite certain that I made no mistake, and, as each prisoner mentioned the names, I wrote them down." Pointing to another document, he said: "This is the original diary written by me from the memoranda, and is the report referred to in my deposition before the Joint Magistrate."

The Judge summed up the case carefully to the Jury. He said: "You have to determine whether you believe the Inspector of the prisoner; if the former, you must convict; if the latter, if you think that the prisoner unintentionally made the false assertions, you must acquit. It is nothing to you whether the alleged false evidence was or was not on a point material to the issue of the case in which it was given, or whether it was on a trifling or on an important point, or whether there is any valid reason for their making a false statement. You have to decide whether the prisoners have falsely stated in their depositions as witnesses in the case against the head constable as to the matter of the building of the zemindary dāk house that they did not state as recited in the charge. There is only one witness for the prosecution; but, under Section 18 of Act II. of 1855, the evidence of that one witness, if you believe it, is sufficient for the conviction of the prisoner, for there is no law or practice of the Mofussil Sessions Courts which requires evidence corroborative of such single evidence in cases of false evidence."

I may observe that the prisoner was called before the Joint Magistrate to prove that, by the desire of the head constable, he had taken bamboos without paying for them from Kartick Ghose and other villagers. He denied it. The question, whether he had told the Inspector that he had not done so, was apparently put to him in order to show that his statement before the Magistrate was at variance with the statement made by him to the Inspector, and consequently that his evidence, in exculpation of the head constable, was not to be relied on as opposed to that which it was expected that Kartick Ghose and the other villagers would give. It was clearly material as affecting his credit and the credibility of his statement on oath before the Magistrate.

It is, therefore, not necessary for me to express any opinion as to whether a false statement, made by a witness on a point wholly immaterial to the issue in a cause, is a giving of false evidence, and, as such, punishable under the 193rd Section.

Vol. V. The only other point is that the prisoner was convicted of giving false evidence, the only proof that the testimony was false being that of a single witness. Section 28 of Act II. of 1855 enacts that, "Except in cases of treason, the direct evidence of one witness, who is entitled to full credit, shall be sufficient for proof of any fact in any Court, &c. But this provision shall not affect any rule or practice of any Court that requires corroborative evidence in support of the testimony of an accomplice or of a single witness in the case of perjury."

An accomplice can hardly be said to be a witness entitled to *full credit*. I am disposed to think that, by the law of evidence in this country, and the practice of the late Sudder Court, the testimony of an accomplice required confirmation (*see* Regulation X. of 1824). I think that, by the rule and practice of the late Sudder Court, some corroborative evidence was required to prove the falsehood of the statement on which perjury is assigned; that a conviction for perjury was not allowed to stand where there was the mere uncorroborated oath of the prosecutor against the oath of the prisoner. *See* a case in Beaufort's Digest, paragraph 4508, in which, however, the rule was probably misapplied. *See* also the case of Goreeb Peada, Nizamut Reports, 1859, page 212; 1 Nizamut Reports, page 314; 2 Nizamut Adawlut Reports, page 168. I am sure that the rule rested on sound policy.

After a very careful consideration, I am disposed to think that the evidence of two witnesses, or at least some corroborative evidence of the oath of a single witness, is still necessary to prove the falsehood of any statement charged to be false evidence. But I feel considerable diffidence on the subject. My view, however, is apparently in accordance with the opinion of Mr. Norton in his Work on Evidence, Section 622. The cases of the other prisoners, who were tried at the same time, are precisely similar. I would quash the convictions. I should regret the acquittal of the prisoners on this ground, the less because of the shape which the charge in the present instance has assumed. The substantial offence of which the prisoners were apparently guilty was that of giving false evidence in order to screen an offender. In order to punish them for that offence, of which there was no sufficient proof, they are charged with having spoken falsely, by denying that they made a particular statement to the police officers.

The confessions of persons accused, made before police constables, are not admitted as evidence of guilt; and it would certainly seem to be a dangerous practice that one who has made such a statement or confession before a single police constable should be compelled to repeat or admit that he made the confession before the Magistrate or Judge on pain of being charged with perjury if he retracts and denies that he made the statement. If the statements of the prisoners made to the Inspector are true, they probably are able to be charged as guilty of or of abetting offences under the 105th or the 409th Section of the Penal Code.

The case having been referred to the Full Bench on the *second* point, as the majority of such Court agree with me, the convictions will be quashed.

Shumbhoonath Pundit, J.—I believe that in the late Sudder Nizamut the Judges almost invariably convicted prisoners tried for perjury, when the oath against the former oath of the prisoner was corroborated; and so I should hold in this case that the testimony of one witness is not sufficiently legal to convict the prisoner.

Campbell, J.—The question arising in this case is a point of law in a criminal appeal from a conviction by Jury, for false evidence, first heard by Mr. Justice Norman and myself. There was a difference of opinion, on account of which we thought it necessary to refer the case to a Full Bench.

If I were charging a Jury, or advising an inexperienced Judge, I should probably say that, in ninety-nine cases out of hundred, a single witness would not suffice for a conviction in a case of this kind. As a matter of credibility, I have no doubt that it is so. But we are now called on to determine the matter simply as a dry point of law, and of law only. The prisoner has been convicted of false evidence in a trial by Jury in the Sessions Court upon the evidence of one witness which the Jury and the Judge deemed worthy of entire credit; and my learned colleague and myself, who sat on the Division Bench, were agreed that, as a question of fact, we neither had the power to interfere nor saw any reason for interfering with that conviction; that, in this respect, the appeal could not be sustained. The only question is whether, that being so, we are, as a matter of technical law, bound to quash the conviction, to say we have no doubt of the truth of the evidence.

for the prosecution, we have no doubt of the guilt of the prisoner, we have no power to interfere with the finding of a Jury on the facts; but still we are, in a case of perjury, bound by a technical rule to release the prisoners, because the evidence of one witness is in law, as distinguished from fact, insufficient for a conviction, and the Jury cannot legally find a verdict upon it. I concur in the view of Act II. of 1855, Section 28, which has been taken by my learned colleague. The *first* sentence of that Section lays down the general law of British India, *viz.*, that one witness of unimpeached credit is (if believed by the Court) sufficient for a conviction in a case of perjury or in any other case. The *second* sentence makes an exception in regard to Courts where a contrary rule or practice is already established. It is not, I think, necessary here to discuss whether in English Courts there is really on the subject a rule of legal effect whether, in a case of perjury proved by a single witness, the question is one for the Jury or for the Judge. I have no doubt that, since the English Law prevailed in the late Supreme Courts, and it was not in 1855 thought necessary to go beyond that law for the purpose of rendering the law of those Courts uniform with that of British India in general; the *second* sentence of Section 28 was intended to reserve the law of England in those Courts in regard to the point now before us, whatever the Judges might construe that law to be. Up to the present moment, the Criminal Procedure is entirely different within and without the limits of the Original Jurisdiction of the High Court, and it seems to me that in 1855 the Legislature recognized and contemplated a very wide difference in the Criminal Law and Procedure within and without the Mahratta Ditch. But the wording of the *second* sentence of Section 28, even if specially designed for the Supreme Courts, in terms extends to all Courts in which there had been previously established a rule or practice requiring corroborative evidence in support of the testimony of a single witness in the case of perjury. The question is, therefore, narrowed to this, *viz.*, whether, in the Courts of Bengal, such a legal rule or practice had been established. I think, however, that, when the Legislature had laid down a broad and liberal rule for British India, and allows only of exception in regard to certain Courts, then, before we establish the exception in the Courts of Bengal, before we give effect to a highly technical rule at variance with the general law of British

India, we must be satisfied that in reality such a rule was clearly, distinctly, and definitely established as matter of law. Previous to the Penal Code, the Criminal Law of the Mofussil Courts was very vague and uncertain. It may be that, both in criminal and civil matters, single Judges may occasionally have somewhat loosely quoted what they supposed to be rules of English Law. But I cannot think that two or three isolated instances of such references, culled from a vast number of decisions extending over very many years, would suffice to establish a rule of law. In this instance, so far as I have seen, even such *dicta* are quite wanting. A great deal depends on the way in which the word "practice" is understood. I quite admit that it may be found that in practice, in a very great many cases, a single witness uncorroborated was not deemed sufficient for a conviction for perjury. But that is, in my view, a question of the credibility, not of the admissibility, of the evidence. The question is whether there is a practice elevated to the dignity of an absolute rule of law, *viz.*, that, though we may to the fullest extent believe the evidence, we cannot convict upon it, and must set aside the verdict of a Jury. Such a rule of law must, it seems to me, have been clearly enunciated and consistently acted on before it can be binding upon us under the terms of the Statute.

I cannot see that it has been so. I do not find it clearly and broadly expressed in unambiguous terms in a single case which has come to my notice. Beaufort quotes one case in which the Judge refused to convict for perjury on the evidence of two witnesses, because it was oath against oath. That can hardly be applicable. One or two other cases have been examined, and especially one is relied on, decided by Mr. Samuells, in which it seems to me that the expressions used mean that in the particular case the Judge did not think, and in similar cases would not think, the unsupported testimony of one or two witnesses interested in the matter sufficiently credible. In truth, on examining this case (Nizamut Adawlut Reports, Vol. IX., p. 210), I find that there were two witnesses who directly swore to the perjury, "the Darogah and a Burkundaz named Meher-oollah." Mr. Samuells also says: "The only evidence against the prisoner is that of the Darogah and the Burkundaz whom he had accused," and "the conviction founded simply on the oath of the persons accused by the prisoners cannot stand." It is evident that

Vol. V. this case is not in point, nor have I seen any other more so. I cannot see that any rule of law on the subject was established in the Courts of Bengal, and therefore I would not give effect to such a technical rule in opposition to the general law of India.

The appellants having been convicted by the Jury, I would dismiss the appeal.

The 12th February 1866.

Present :

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Circumstantial Evidence—Proof of guilt—Moral conviction of Judge.

Queen versus Sorob Roy.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of murder.

The guilt of a prisoner must be clearly proved before he can be convicted, and a weak case cannot be strengthened by the fact that the police has had many difficulties thrown in their way.

Abounding is but slight evidence of guilt usually.

Convictions must be based on substantial and sufficient evidence not merely "moral convictions."

THE prisoner in this case has been found guilty of the offence of murder, and has been sentenced to death. The Sessions Judge and the two Assessors by whom he was tried were unanimous in the conviction. The case has been referred to the High Court for confirmation of the sentence. Having fully considered the evidence on the record and the judgment of the Sessions Judge, the conclusion at which we have arrived is that the evidence is wholly insufficient to support the conviction, and that the prisoner ought to have been acquitted.

The person murdered was a woman by name Nagirja, the mistress of the prisoner, who seduced her about three or four months before her death from the house of her husband at Dinapore. She lived with her mother Bhagaruttia, and was constantly visited by the prisoner, who usually passed the night with her. The prisoner lived in the same village, in the house of his father who was a man of some position and influence, being the Tehsildar of that and some neighbouring villages.

On the night of Tuesday, the 3rd of October, or rather early in the morning of the 4th, the deceased was found dead in her house, where she usually slept, her throat having been cut. On the 4th, constables from neighbouring stations reached the spot,

and, on the morning of the 5th, a native Inspector of Police from Arrah arrived. The latter found that nearly all the villagers had run away, and could get no information or assistance from any one. In consequence of his representations, a Deputy Magistrate on the 9th went to enquire into the case, and the result of his enquiries was that he committed the prisoner for trial on a charge of murder. So far there is no question as to the facts.

There is no direct proof against the prisoner, the case being one entirely of circumstantial evidence. In order that our reasons for not concurring in the finding of the Lower Court may be distinctly understood, it is essential that we should go at length into the details of the evidence. We must premise, however, that, whatever may have been the difficulties thrown in the way of the police, and however much the officers who had charge of the preliminary investigation may have been obstructed, it is not less necessary in this than in any other case, that the guilt of the prisoner should be clearly and conclusively brought home to him before he can be properly convicted. A case weak and inconclusive in itself cannot be in any degree supplemented or strengthened by the fact that every exertion has been made to prevent the police from discovering the truth. Much as it is to be regretted that the perpetrators of a foul murder should not be brought to justice, no Judge can rightly permit that feeling to influence his judgment, when the question which is before him is whether or not it is proved beyond all reasonable doubt that a particular individual is the murderer. When it is distinctly proved that an accused person has attempted to remove or destroy that which is evidence of his guilt, or to keep out of the way witnesses who, it is shewn, could prove the case against him, such a fact may properly be used in support of the prosecution. But that is a very different case from the one now under consideration, where all that is alleged (and it is not strictly proved) is that the prisoner and his relations have such influence in the village that those who know what happened will not come forward and speak the truth.

The person who, no doubt, could clear up the whole matter, if she chose to do so, is Bhagaruttia, the mother of the murdered woman. She and her daughter lived in the same house, though they slept in different rooms. On the night of the murder, both of the women slept in the house, and the mother was the first person who, in the morning,

found her daughter lying dead. Unfortunately the statements which this woman has made since the murder are so varied and contradictory that it is, in our opinion, impossible to rely upon them as proving anything. At first, on discovering that her daughter had been killed, she seems to have said that the prisoner had killed her daughter. The constable who reached the house on the evening after the murder says that she told him that thieves had broken into the house, and committed the murder. To the Police Inspector, who arrived the next morning, she first said that thieves had done it, but afterwards she said the prisoner had done it. To the Deputy Magistrate she said she did not know who did it. Before the Sessions Court she said that thieves did it, and she saw three men running away. Again, before the Magistrate she admitted that the prisoner had seduced her daughter, and kept her as his mistress; while in the Sessions Court she absolutely denied that she ever said anything of the kind, and declared that the prisoner never had any connection with Nagirja. It is very unfortunate that this witness, who probably knows all, will not disclose what she knows. As it is, her testimony is of no weight against the prisoner. If it be true that she did at first say that the prisoner had killed her daughter, this does not prove that he really did kill her. What she said is evidence only so far as it goes to show that the statements subsequently made by her are untrue. Moreover, if she did at first cry and say that the prisoner had killed her daughter, it may very possibly be that she said so without meaning to say that it was his hand that did the deed; for, by whomsoever her throat actually was cut, there is no doubt whatever that it was on account of her connection with the prisoner that the deceased was murdered. We consider that the case must be dealt with wholly irrespective of the statements made by the deceased's mother, whether at the moment of discovering the murder or subsequently. Such as they are, they cannot be satisfactorily or justly used either for or against the prisoner. The story as to thieves being the murderers, rests solely on this woman's evidence. We quite agree with the Lower Court in rejecting this story as utterly unworthy of credit. It is quite clear that it was not for the purpose of theft that this murder was committed.

Apart from the evidence of the mother, the case for the prosecution is that, on the night of the murder, the Chowkeedar of the

village, in going his rounds, heard the voices of the deceased and the prisoner as they talked inside her house; that the prisoner was seen on the morning of the murder to leave the house of the deceased soon after daylight; that early on that morning he was seen near his own house coming from the direction of the deceased's house with stains of blood on his clothes, and that, as he was coming along, a certain conversation took place between the prisoner and his brother Sarawuth, in which allusion was made to the death of Nagirja; that he was afterwards seen at a well, where blood was observed on his clothes; that the day before the murder he borrowed a *hansua*, such as *laree-walas* use, with which the throat of the deceased may have been cut; and that he absconded immediately after the murder.

Let us consider the evidence on which this case rests. Three women, Gurbhini, Purwa, and Ramonia, say they saw the prisoner coming away from Nagirja's house soon after daylight, "about two *ghurrees* of the day," as they went to draw water. Gurbhini says she saw him come out at the door of the house of the deceased. Purwa says she saw him coming from the house "near a *peepul* tree close to the house, fifteen paces off." Ramonia says, first, that she saw him come out at the door, and then that she saw him near the *peepul* tree, "which is about 20 feet from the house." All three women agree in saying that, immediately after they saw the prisoner, they heard the mother cry out that he had murdered her daughter. Then the Chowkeedar Soobkaran says that, as he went his rounds through the village, he heard the prisoner and the deceased talking in her house on the night of the murder, but they were not quarrelling. In the morning he saw the prisoner "at sun-rise going towards the south from the direction of Nagirja's house, about 25 paces from it." Then the Chowkeedar went home to his own house, whence he returned soon after, on news of the murder reaching him. This Chowkeedar noticed the dress worn by the prisoner, and saw that he had a *dhotee* and *gilaaf*: yet he did not observe that it had blood on it—an important fact when it is borne in mind that two other witnesses, on whose evidence we shall presently touch, speak to stains of blood being visible. The women apparently were asked no questions as to the dress of the prisoner. They ought to have been examined on this point, seeing that the case for the Crown is that his clothes were visibly stained

Vol. V. with blood—seeing also that, before the Deputy Magistrate, Gurbhini and Purwa deposed that the prisoner, when they saw him, had only *dhotee* and a cloth round his head, and that he had no cloth round his body, and that all three women deposed that they saw no marks of blood. Again, the women who say they saw the prisoner near or leaving the house of Nagirja declare that, immediately after seeing him, they heard the mother's cry that the prisoner had killed her daughter. Yet the Chowkeedar, who, according to the evidence, must at that time have been close at hand, heard nothing of this, but went quietly home.

The witness who comes next in the order of events is Azghaibi Oopadhya. He says that, on the morning of the murder, "at early dawn before sunrise," he met the prisoner as he approached his (the prisoner's) own house, and that there was blood on his *dhotee* and *chudder*. The prisoner's brother Sarawuth was there too—it does not appear how or why—according to this witness, who relates a most extraordinary conversation which he says then took place between the brothers. The witness says: "I saw blood on his *dhotee* and *chudder*. His brother Sarawuth asked how it came there. He said: 'You have killed my woman, and yet you ask me where the blood comes from?' Sarawuth said, 'I have just reason, what do I know about your woman?' I then heard a cry in the village 'that the prisoner had murdered the shepherdess (the deceased).' We utterly disbelieve that any such conversation ever did take place; and if it did take place, it would not, in our opinion, indicate that the prisoner was the murderer. The story is, that the prisoner having murdered, deliberately and in cold blood, the mistress with whom he was living on terms of the closest intimacy, walks by daylight openly away from the scene of the murder with stains of blood visible on his clothes; that he does not shun being seen by the village-chowkeedar and others as he leaves the house where he has committed the murder; and that, in the presence of a stranger, he holds the remarkable conversation which we have just given in full as to the source of the blood-stains. Such a tale is incredible if it be supposed that the prisoner was the murderer: it is credible (if at all) only on the supposition that he was *not* the murderer, although both he and his brother knew that the woman had been murdered and by whom.

Another witness, Mahomed Ali, is the only person, save Azghaibi Oopadhya, who speaks as to having seen blood-stains. He says that, on the morning of the murder, the prisoner and his brother were bathing at the well, and he saw blood on the prisoner's *dhotee*. What can be more improbable than this? The woman is murdered; the whole village names the prisoner as the murderer: yet he goes with his brother, and bathes quietly at the well with a blood-stained *dhotee* exposed to the public view. On the whole, we do not consider it to be in any degree proved that the prisoner ever was seen on the morning of the murder leaving the house of the deceased or with stains of blood on his clothes.

The witness Mahomed Ali testifies to the prisoner having borrowed from him a *hanswa*, such as *taree-walas* use, the day before the murder, and he is corroborated by Neeamut. The theory for the prosecution is that this *hanswa* was used by the prisoner to cut the throat of the deceased. This theory, however, is not borne out by the evidence. For, though it may be proved that the wound might have been inflicted by a *hanswa*, it is not proved, nor even suggested, that it might not equally well have been inflicted by a common knife or some other instrument not a *hanswa*, and there is not a scrap of evidence to show that the woman's throat was in fact cut with a *hanswa*, much less that it was cut with the one which Mahomed Ali says he lent to the prisoner. The *hanswa* which is said to have been borrowed has not been shown to have been ever seen in the possession of the prisoner, nor has it been found since the murder. Even if it be believed that the prisoner did borrow a *hanswa* from Mahomed Ali, the mere fact that he has never returned it, scarcely, if at all, strengthens the case against him.

In absconding when the murder was discovered—and no doubt he did abscond—the prisoner only did what was done by almost every body else in the village. Under certain circumstances, the case against an accused person is certainly strengthened by his running away, and it is so to some extent in the present instance. But a man who runs away may be, and often is, innocent, and any presumption of guilt which may arise from such a course is usually but a very small item in the evidence on which a conviction is based. There are many considerations other than those of his own guilt, which, as it appears to us, may very possibly have

moved the prisoner to act as he did in this respect.

Reviewing the whole case, we are of opinion that, while the positive evidence fails to prove the prisoner's guilt, the probabilities are much in his favor. There is no proof of any such motive as might be expected to lead to the commission, by him, of this crime. The woman was his mistress and on good terms with him. There is no evidence that they had ever quarrelled. Why then should the prisoner murder her in the cold-blooded way in which he did it, if the case for the prosecution be true? The Sessions Judge says on this part of the case: "What 'the prisoner's motive was is not disclosed 'by the reluctant witnesses; but the Inspector says the girl had begun to go after 'other men, and this of itself is sufficient to 'account for the prisoner's bad feeling towards 'her. Rajpoots seldom tolerate infidelity." The Judge was wrong in considering that he had before him any legal evidence whatever of the deceased having been unfaithful to the prisoner. All that the Inspector says is—"Kanjalye Sing, Constable, came and said: 'The prisoner had murdered the girl, because 'she had gone wrong with other men." What the constable said to the Inspector was mere hearsay, and not evidence. Kanjalye was not himself examined in the Sessions Court, although his deposition was taken by the Deputy Magistrate, before whom he said nothing as to any infidelity on the part of the deceased towards the prisoner. If the Sessions Court thought it desirable that Kanjalye Sing's evidence should be before it, that person ought to have been examined, when the Court would have been able to see what his information was worth. But the Court had no right to take his statements at second-hand from the Inspector, and act upon them as if they were evidence against the prisoner. As it is, we have no evidence whatever of any infidelity which could have been the motive for the committing of this murder by the prisoner. On the other hand, a woman, by name Jamonia, who was examined by the Deputy Magistrate, but not by the Sessions Court, says expressly that it is not the case that the deceased was unfaithful to the prisoner or went wrong with other men. Many witnesses were examined by the Deputy Magistrate who were not examined in the Sessions Court. This, of course, may very properly be so. But the depositions of witnesses taken before the Committing Magistrate may (when the witnesses are not examined at the trial), and in fairness ought to be

referred to, when they are favorable to the prisoner, although they cannot be read as against him. From the depositions of two witnesses of this class, Golam Ali Khan and Zarut Hossein Khan, we find indications of a state of feeling on the subject of the connection of the deceased with the prisoner, which show that it is highly probable that persons, other than the prisoner, may have desired to get rid of her. The former of these witnesses tells the Deputy Magistrate how the prisoner had quarrelled with his father and brother on account of the deceased; how they had in consequence incited the *gureryas* of the village (the men of the caste from which it is proved she had been ejected on account of her connection with the prisoner) to beat him; and how the prisoner, being enraged thereby, went and murdered the unfortunate cause of what had happened. The latter says that, when the murder became known, it was first said that the deceased had been murdered by the low *gureryas* of the village, on account of her misconduct. There is no evidence that the facts are as spoken to or suggested by these witnesses. We do not allude to their depositions as being evidence of these facts, or otherwise than as indicating that, so far merely as motive and probabilities are concerned, there were other persons in the village who may have been at the least as likely as the prisoner to desire to put the deceased out of the way and to compass her death.

The question we have to decide is not whether it is proved that the prisoner did not commit this murder, but whether it is proved beyond all reasonable doubt that he did commit it. We think it quite impossible to say that, on the evidence to which alone we can look, it is established beyond reasonable doubt that the deceased was murdered by the prisoner; on the contrary, we entertain the gravest doubts on the subject. There is no doubt that it was because of her connection with the prisoner that the deceased's life was taken away; but there is very great doubt in our minds as to the prisoner being the person who either desired or brought about her death. The case is in no degree conclusively proved against him; and the "*unbiased moral conviction*" of guilt, which the Sessions Judge says he felt in this instance, is no sufficient foundation for a verdict of guilty, unless that moral conviction is based on substantial facts which lead to no other reasonable conclusion than that the person charged is guilty.

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It is not proved that the prisoner committed this murder. We, therefore, acquit him of it, and order his release.

The 20th February 1866.

Present:

The Hon'ble G. Campbell and J. B. Phear,
Judges.

False charge of offence (What constitutes).

Queen versus Bonomally Sohail.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of making a false criminal charge with intent to injure.

To prefer a complaint to the police in respect of an offence which they are competent to deal with, and thereby to set the police in motion, is to institute a criminal proceeding within the meaning of Section 211 of the Penal Code.

In this case the question of fact was one eminently to be dealt with by the Court which heard the evidence; and in the Sessions Court, the Sessions Judge and the majority of the Assessors have come to the conclusion that the charge made by the prisoner was false and malicious, as did the Local Magistrate who investigated the case. We see no ground for the interference of this Court with such a finding of fact.

As respects the question of law on which the Assessors differed from the Sessions Judge, we are of opinion that to prefer a complaint to the police in respect of an offence which they were competent to deal with, and thereby to set the police in motion, is to institute a criminal proceeding within the meaning of Section 211 of the Penal Code. We dismiss the appeal.

The 22nd February 1866.

Present:

The Hon'ble F. A. Glover, *Judge.*

Murder—Culpable Homicide not amounting to Murder—High Court (Power of—to interfere with failure of Judge to convict on graver charge).

Queen versus Sobee Mahee.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Sylhet, on a charge of murder and culpable homicide.

Where a Judge acquits a prisoner of intention to kill, but admits that the prisoner struck the deceased with a highly lethal weapon with the knowledge that the act was such as was likely to cause death, the conviction should be for murder, and not culpable homicide not amounting to murder.

The failure of the Judge to convict the prisoner on the graver charge is not an error of law with which the High Court can interfere under its revising powers.

THE prisoner in this case has not appealed. The case was sent for by the Sessions Judge in the English Department, and comes before me under Chapter XXIX. of the Code of Criminal Procedure.

That the finding of the Sessions Judge on the evidence is wrong, I have no doubt. It is amply proved that the prisoner struck the deceased repeated blows with a highly lethal weapon (a *dao*), and the Sessions Judge himself admits that he did so with the knowledge that the act was such as was likely to cause death, although he acquits the prisoner of intending to kill.

This finding appears to me altogether inconsistent both with the evidence and with the Sessions Judge's own remarks. The conviction should have been for murder.

There seems to be, however (and I have taken advantage of the delay in disposing of the case to consult some of my learned colleagues on the points), no way of remedying the mistake now, or of bringing the Sessions Judge's order within the provisions of Section 405 of the Criminal Procedure Code. The facts found by the Sessions Judge and Assessors are not absolutely inconsistent with the lesser offence of "culpable homicide not amounting to murder," and their failure to convict the prisoner on the graver charge, a charge which was amply supported by the evidence, is not an error of law with which this Court could interfere under its revising powers.*

Since writing this order, it has been brought to my notice that the prisoner did prefer an appeal after the case was sent for by this Court. The circumstance does not affect the decision which I have already come to on the evidence. I find from that evidence that the prisoner is clearly guilty, and ought to have been punished much more severely than he has been.

* A Full Bench (present, Peacock, C. J., and Kemp and Seton-Karr, J. J.) laid down the law on this point (see Torab Sheikh, W. R., Vol. V., p. 2).

The 26th February 1866.

Present :

The Hon'ble J. P. Norman, G. Campbell,
and J. B. Phear, *Judges.*

Murder—Culpable Homicide not amounting to Murder.

Queen *versus* Gokool Bowree, Kishto Bowree,
and Mussamut Oodoy Bowree.

*Committed by the Magistrate, and tried by
the Sessions Judge of West Burdwan,
on a charge of murder.*

Held by the majority of the Court that the offence committed was murder where the death of a weak half-starved old woman, who was detected stealing, was caused in the exercise of the right of private defence by the doing of more harm than was necessary for the purpose of such defence; Campbell, J., *contra*, being of opinion that a man who detects a thief stealing his property, and who, acting on the sudden impulse of the moment, inflicts on the thief blows so severe as to be likely to cause death, but which he did not at the time know or feel to be likely to cause death, and which would not necessarily have caused death to a person in ordinary health, but which, owing to abnormal weakness in the deceased not known to him, did cause death, is not guilty of murder, but of culpable homicide not amounting to murder.

Norman, J.—THE prisoners, male and female, have been convicted of murder, and sentenced to death by Mr. Tucker, the Judge of West Burdwan, and the case sent up to us for confirmation of the sentence.

The prisoners appeal.

The case has not been satisfactorily tried.

In the depositions, as given by several of the witnesses before the Magistrate, circumstances appear, into which it was most material that enquiry should have taken place before the Judge. The Judge appears to have put hardly any question to the witnesses, by way of cross-examination, in order to explain their omissions, and clear up the discrepancies between the statements before him, and those before the Magistrate.

The evidence is as follows:

Kishto Bearer.—"I heard a noise, as if a hyena was killing a man. I came out, and saw Gokool, Kishto, and Oodoy. Gokool and Kishto had hold of Kumnali's arms, one on each side, and Oodoy was following. I asked Gokool, 'Why have you beaten Kumnali?' He said, 'She was pulling up my rice.' Kumnali said nothing. It was half-past ten. It was a dark night. I don't remember whether it was dark or moonlight. I saw them from a distance of two or three cubits."

Munda Khinne says: "About supper-time, hearing from my sister Dato that my mother Kumnali had been killed by Kishto and Gokool, I came out of my house, and

saw Gokool, Kishto, and Oodoy dragging along the body of my mother. She did not speak, so I supposed she was dead. I followed them to the common house of the three prisoners. The body of my mother was carried into the house. I sat under the eaves of the house, and began to cry. Then Kishto abused me, seized me by the neck, and pushed me away. Before they dragged my mother into the house, they let her fall, and her head struck against the wall, which was sprinkled with her blood. I went home. I was crying when the chowkeedars came towards the end of the night. I told them what I had seen, and told them to give notice. I don't know what quarrel there was between the prisoners and my mother. There had been a quarrel in consequence of prisoners' pigs rooting up my mother's '*urhur kullye*' plants. My mother had gone out to Heerapore, about 5 o'clock, to get some *bokool*—medicine for sores."

Dato says: "A little daylight was remaining, when my mother went out to buy medicine. At half-past ten I heard a noise, the cries of my mother. I went running to Bholoy manjee's tank, the land close to the tank about 400 or 500 cubits from my house. There I saw Gokool and Kishto beating my mother. Gokool had a sickle with which he struck my mother on the head. Kishto was striking her with a (*tenga*) short club. Gokool had also a *tenga*, and Oodoy was kicking and striking my mother with his foot, and Gokool struck her also with the *tenga*. I fell at their feet, entreating them not to beat my mother. Gokool was about to beat me, but Oodoy, his wife, caught hold of him, and prevented him. Then the three prisoners dragged my mother to their house. In the meanwhile, I had given notice to my sister Munda. We both saw the prisoners take my mother's body into their house. We tried to enter, but they abused us. Next day the police came at dawn, and took my mother's corpse from the prisoners' house. The night was a moonlight night. My mother had told me there was a quarrel between her and the prisoners. 'We must take care and avoid those enemies of ours.'"

Before the Magistrate she said that her mother had no *bokool* in her hand, that she did not know if her mother had any quarrel with the prisoners.

Rhedhoy Chowkeedar heard a noise, went up, and found Munda crying. She said that Gokool had killed her mother. He enquired of Gokool, who said that she came to steal

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Vol. V. his rice, and he beat her. He and Sham remained in charge of the prisoner and of the body.

To the Court.—The prisoners' cultivation is about one mile from their house; there was paddy, but I do not know if it was ripe. Their cultivation lies south from the house. Bholey manjee's tank lies south from the house. People can go to Heerapore by the tank, but it is not the direct road.

Cross-examination by Gokool.—You did not make over-charge to me of Kumnalli, and of stolen paddy that night. When it was near dawn, you shewed the dead body and some paddy, which you said she was stealing.

The Civil Surgeon says: "There were two severe contused wounds on the scalp, over a little above the forehead, on the left side, and the other on the crown of the head, each about 1½ inches long. On raising the scalp, much blood was found extravasated, but there was no fracture of the skull, or laceration of the brain, or effusion of blood within the skull; there was a contused wound over the upper part of the right shoulder-blade, and that bone had been fractured.

"The *ulna*, one of the bones of the fore-arm, was fractured in both fore-arms. There was blood on both hands, and several abrasions. The second phalanx of the ring finger of the left hand was fractured. On the right hand there was a contused wound between the index and middle fingers, and on the knuckle of the little finger. There were abrasions on the right and left fore-arms, on the right arm, inside the right knee, and on the right shin. The above injuries may have been caused by blows from heavy *lattes*. Death may have been due to the concussion of the brain, or to the shock to the system, caused by the above numerous injuries, the woman being weakly, and evidently ill-nourished. I examined her internal organs. They were in a healthy state, but all the mucous membranes were very pale, probably caused by want of nourishment. The woman was very thin, and her bones were small and slight. It would require a very severe blow to break the bone of her shoulder-blade, as it was protected by flesh and muscle, &c."

Before the Magistrate, the witnesses, Munda and Daro, said that, after the prisoners had taken the body of the deceased to the house, they warmed the body of the deceased before the fire.

A witness, whom the Judge did not think proper to call, says that he saw the deceased lying dead in the house of the prisoners; there were about three seers of *dhan* lying near the deceased in a basket.

The prisoner, Gokool bearer, before the Magistrate, said: "I went out to look after my rice, and found four people stealing my rice, three of them ran away, and I caught the fourth, and beat her. It was a dark night, and I could not distinguish whether the deceased was a man or a woman. I had a stick in my hand. While beating her, she spoke, and I found she was a woman. I then took her by the hand, and gave her over to Rhedhy Chowkeedar. In the morning, the villagers assembled, and found she was dead."

Before the Judge he says: "Kumnalli, the deceased, came to steal my paddy. It was a dark night, and I struck her with a *tengo* five or six times. I took Kumnalli with the rice from my field to the door of my house, and there I made her over with the rice to Rhedhy Chowkeedar."

The other two prisoners, by way of defence, say that they were not out that night, and that assertion has been throughout corroborated, so far as it is a corroboration, by the express statement of Gokool.

The Judge considers that the deceased was way-laid and murdered by the three prisoners. He convicted the prisoners of murder, and would sentence them all to death.

I see nothing whatever in this case which would warrant me in disbelieving the three chief witnesses for the prosecution. Their evidence appears to be given temperately and dispassionately. Daro admitted before the Magistrate that, so far as she knew, her mother had no quarrel with the prisoners, and that she had no *bakool* in her hand. Her silence, the absence of complaint of the other villagers, as they went along, may well be explained, if we suppose that, hearing the prisoners charging the deceased with having stolen rice, she may have been conscious that her mother, who had previously committed small thefts, and was then suffering from poverty and starvation, was but too likely to have been guilty of the offence. There is a great want of evidence as to what took place between half-past ten, when the prisoners were seen dragging home the body of the deceased, and half-past two or three o'clock, when the Chowkeedar came. But it is a very important matter. According to the evidence of Rhedhy given before the

Magistrate, it was not until three o'clock in the morning, after the old woman had been ascertained to be dead, and Daro had gone to fetch the police, that the prisoner Gokool set up a shout of *chor dhoragacha* (I have caught a thief). The numerous injuries found to have been inflicted on the person of deceased support the theory of the prosecution that the attack was not made by a single person.

The broken shoulder-blade must have been caused by a blow from behind, and the wound over the forehead, and the broken arms, apparently by blows from a person standing before her. Now, the two male prisoners were seen dragging along the apparently insensible body by Kishto and Munda, and all the three prisoners were seen by Daro beating the deceased. I am satisfied that the defence of the second and third prisoners is false, and that Daro's story is true. I think that in favor of the prisoners it may be taken that the deceased had stolen, or was supposed by the prisoners to have stolen, their rice. Indeed, no other intelligible motive for the attack, except that assigned by the prisoners themselves, is suggested.

After a careful consideration of the facts, I think it clear that there is nothing to shew that the prisoners were acting in defence of their property so as to bring the case within Exception 2 in Section 300 of the Penal Code. According to the evidence of the witness Rhedhoy, the prisoner's cultivation is about a mile from the house. How far it is from the spot where Kishto heard what was probably the cry of agony of the deceased, the Judge did not enquire. And, in favor of the prisoners, it may be assumed that the attack on the deceased was made either in or immediately after she had left the cultivation of the prisoners with *dhan* belonging to them in her possession. Still, looking at the terrible character of the injuries sustained by the deceased, a wretched weakly half-starved old woman, it is impossible to come to any other conclusion than that the two male prisoners at least inflicted them *with the intention of doing more harm than was necessary for the purpose of the defence or recovery of their property*. Their object was no doubt to capture and revenge themselves on a plunderer. I think, therefore, that the two male prisoners have been rightly found guilty of murder. As they appear to have acted under provocation, and not to have intended actually to kill the deceased, which appear to

me proved by their bringing home her body to their own house, and placing it by the fire to warm it, I would not confirm the sentence of death, but would sentence them to transportation for life.

As the only evidence against the female prisoner is that she struck and kicked the deceased, and as it may well be, and is probably the case that, in abetting the attack by the other prisoners, she was aiding or defending their common property, and had no intention of doing or causing any serious harm to the deceased, I concur in acquitting her.

Phear, J.—The three prisoners have all been convicted of murder in a trial held before the Court of Session of West Burdwan with the aid of two Assessors. The two Assessors concurred with the Judge only with regard to the first prisoner Gokool. They were unanimous in thinking that the evidence was insufficient to establish the guilt of Kishto and Oodoy. Under these circumstances, sentence of death was passed upon each prisoner, and the case now comes before this Court for confirmation of these sentences. The three prisoners have also appealed, and thus all the questions, both of law and fact, which arise upon the evidence (and they are several), are open before us. It is, strictly speaking, only necessary for me to state, as shortly as I can, the view which I take of the facts as I gather them from the depositions. But I think I am bound to remark at the outset that the record sent to this Court by the Judge as his notes of what the witness deposed to at the trial before the Court of Session is most meagre. If nothing more was elicited from the witnesses than appears on these sheets, I have no hesitation in saying that the trial was very incomplete and insufficient. There is nothing to indicate that the slightest cross-examination of the witnesses was attempted, nothing to show this Court that any enquiry was made into several circumstances of time, place, and motion, which suggest themselves on the evidence of the witnesses, and which, unexplained, render that evidence very unsatisfactory. Fortunately, the depositions taken at the preliminary investigation before the Assistant Magistrate, to some extent, supply what is wanting in the Judge's notes, and induce me to suppose that more came out at the trial than the Judge has put upon paper. If I am wrong in this supposition, the Judge was inexcusably negligent; for he must have had for his guidance in the conduct of the trial the depositions taken by the Assistant

Vol. V. Magistrate to which I have alluded, and which seem to me extremely good. Indeed, if I did not give the Judge the benefit of this supposition, I should be obliged to say that the preliminary enquiry before the Assistant Magistrate was much more full and searching than that at the final trial before the Court of Session. But, to return to the facts of the case, it seems to me tolerably certain that Gokool caught the old woman Kumnalli either actually stealing his paddy or coming from the direction of his plot of ground, under such circumstances as might well lead him to believe that she had been stealing it. The place where she was set upon was clearly not in the direct road from Heerapore; and, if the old woman had, as her daughters wish to have it believed, been returning from that place late at night, she would hardly have gone so far out her way as the back of Bhuloy manjee's tank. Moreover, it is not said that any of the medicine which she is alleged to have gone to Heerapore for the purpose of fetching was found either on her person, or on the ground in the neighbourhood of the spot where the affray took place; nor has the medicine yet been called to prove that she was at Heerapore at all on that evening. No doubt, this is negative reasoning, but I think the prisoners are entitled to the benefit of it; for it was clearly incumbent upon the prosecution to put these points beyond all doubt. Further, it seems certain that the old woman had committed thefts of this kind before. She was evidently very poor and half starved; and in this time of scarcity we need not seek further for an *a priori* probability in favor of the prisoner's story, so far as it regards the stealing; and, if the medicine errand is a fabrication, great corroboration is given to the hypothesis of the old woman's dishonesty, which is further strengthened by what I believe to be an admitted fact, namely, that the place where Kumnalli was attacked was either very close to Gokool's paddy field, or on the way thereto from Kumnalli's; but I put on one side the evidence as to the *dhan* relied upon by the prisoners, because there was so much opportunity for manufacturing it after the fact as to render it worthless; but it is, I think, to be regretted that no attempt was made to ascertain whether the basket in which the *dhan* was contained was capable of being identified as belonging either to the deceased or to the prisoners. On the whole, then, I think Gokool did, as he says, fall upon the old woman, and beat her under the belief that she was engaged in stealing his paddy. I also

think that the two other prisoners were with him at the time, because Kishto, an apparently disinterested witness (although I would remark by the way that he seems of the same caste, if not family, as the deceased, and yet no enquiry appears to have been made whether he was or not) distinctly speaks to seeing them assisting Gokool in leading Kumnalli to his house. How far they took part in the actual beating is the next material question. To a certain extent the false *aribi* (as I believe it to be) set up by these two prisoners raises presumptions unfavorable to their innocence. The evidence of Kumnalli's daughter Daro is the only direct evidence on the point; and to my mind that is tainted with much suspicion of untrustworthiness. There are discrepancies of importance between her and her sister, and between what both these women said at the trial and their respective depositions made before the Magistrate; also they both speak to the presence of the prisoner's daughter at a time when the witness Kishto states that he did not see her, and when he must have seen her had she been there, as they say. However, according to Kishto, they were with the party when the deceased was being led home, and I do not doubt that Daro at least saw the beating. Her description of the occurrence is very natural and graphic. Indeed to my mind it is more than probable that both these women were engaged with their mother in the act of stealing. It is mark worthy that they alone, of all the village, except Kishto, heard the old woman's cries, and that so quickly that Daro was able to be on the spot sufficiently soon to see nearly all the beating. If the two women were with their mother, or close to her, the prisoner Gokool's statement is not altogether without foundation, although it would amount to a gross exaggeration of the actual facts. If these two witnesses said no more at the trial than is reported to us by the Judge, there has been, I feel obliged to repeat in my judgment, a lamentable failure of investigation in the case, considering that the lives of these persons depend entirely upon the color given to the facts by Munda Khmee and Daro. Their own conduct, during the whole of this eventful night, ought to have been most carefully sifted, and yet we are scarcely furnished with a single scrap of positive information on the point. When Kishto saw them by his account, they were crying and going on before their mother who was being led by two of the prisoners. By their

own account, they were following, at any rate they were making no alarm, and did not even complain to Kishto. The irresistible conclusion to me is that they were at that time more conscious of fault on their own side, than impressed with the wrongful conduct of Gokool. Again, this was certainly about 10½ o'clock at night by their own account and by that of every body else who could speak to it, and it is equally certain that no alarm was given or complaint made by the daughters to the police before 3½ A. M. What was the reason for the silence of these women during these intervening five hours; and what were they doing all that time? Munda Khinee, the first of the daughters, says that, after crying at the prisoners' door, she went home, and remained there till the Chowkeedars came to her in the morning. At the trial, Daro does not seem to have been asked a question on the subject. Before the Magistrate she said she went to call three Chowkeedars whom she named; but she did not mention the time of night when she did this, and Rhedhoy, a Chowkeedar, not one of these three, said that he went to Gokool's house at about 3 in the morning in consequence of hearing a noise, and that he found Munda Khinee crying there. In the commencement of his deposition before the Magistrate, he said that, while on his beat about 3 A. M., his attention was first called to the matter by hearing Gokool shout out that he had caught a thief. Further on, he gave another hour for this occurrence. He seems also to imply that the three Chowkeedars mentioned by Daro were with him, and that they all four went together to the house of Gokool. When they arrived, Munda Khinee was there crying. Daro was not there. The evidence of the other three does not accurately agree with this. Poresb says before the Magistrate that Daro came to call him in the road, coming from his *parah*, where she had been for him. He went to the house, and found the other Chowkeedars already there; and Sham, the third Chowkeedar, distinctly said that Daro came to him at his *parah*. While the fourth Chowkeedar Nobin deposed before the Magistrate that, when he was returning early in the morning from his rounds, he met Daro crying, and that was the cause of his going to the place. It thus appears that, while Daro clearly brought three of the Chowkeedars to the spot, about 3 or 3½ in the morning, the first Chowkeedar Rhedhoy came there in consequence of Gokool's calling him, possibly at a much earlier time, and so far

the prisoner's story is supported. I cannot help thinking that there may also be truth in the prisoner's assertion that he made over the unfortunate woman and the daughter to Rhedhoy at an early period of the transaction. Undoubtedly, this part of the case ought to have received a most searching investigation, and yet the Sessions Judge considered it unnecessary at the trial even to take the evidence of the two last Chowkeedars at all. Whether or not the prisoner Gokool did, as he says, at an early period, invoke the aid of the police, he certainly let or carried the old woman to his house after the beating, and there (according to the evidence given by the daughters themselves before the Magistrate, but unaccountably not elicited at the trial) washed her, and tried to revive her by warming her before the fire. This seems to me entirely consistent with Gokool's statement that he had beaten the unfortunate wretch, because he found her stealing his paddy, and goes far to negative the supposition which the Judge appears to have entertained that he attacked her with the deliberate purpose of taking away life. Keeping in mind, then, all the conclusions to which I have arrived, bearing adversely on the conduct of the mother and daughters, and in some degree favorably to the prisoner, I cannot avoid further observing that both the daughters admit the existence of a quarrel between their mother and the prisoners, and both exhibit an anxiety by groundlessly implicating Kheti, to include every member of the prisoner's family in the present charge. To my mind all the foregoing considerations greatly affect the trustworthiness of Daro's evidence, when she, in describing the attack which she saw made on her mother, speaks of the active part which she makes the prisoners Kishto and Oodoy to take in it. Before the Magistrate she accused Kheti of having beaten her mother in concert with the prisoners; but at the trial she mentions the prisoners alone as the assaulting persons. Therefore, judging from the paper evidence only, I should be reluctant to convict Kishto and Oodoy solely upon Daro's testimony, with regard to their having inflicted blows on the deceased. Then I find that both the Assessors who sat with the Sessions Judge at the trial, and had the opportunity of observing the witness in the box, entirely disbelieved her; for they say: "There is no eye-witness to Kishto and Oodoy having taken part in the beating, as the evidence of the witness Daro is sufficient." Under these cir-

Vol. V. cumstances, I think I ought not to allow the specific statements which she makes against Kishto and Oodoy to have weight on my mind. Consequently, as far as I can gather from the evidence, the case stands thus: Gokool with his wife and son came upon Kumnalli stealing, or apparently stealing, his paddy about 10½ o'clock at night. It is not clear whether the prisoners were lying in wait up to the time of the occurrence, or had just then come out; but I have no doubt they were on the spot with the purpose and expectation of detecting thieves. On seeing Kumnalli (and possibly her daughters with her), Gokool, by his own confession, rushed forward, struck the unfortunate woman down with a *lattee*, and beat her most severely. I am not satisfied that his wife and son inflicted any blows themselves, or, at any rate, blows of a serious character; still, I think they intentionally aided and facilitated the commission of the act of beating. This being so, they are responsible as abettors of Gokool to the extent of their intentions when so abetting him. That these intentions reached to murder, or to the commission of any of those grave acts, which must, some one way or other, be found as an ingredient in the case before it can amount to even culpable homicide, I do not believe. To some degree, of course, the intentions of parties to a wrongful act must be judged of by the event. If nothing more were known than that Kishto and Oodoy were associated with Gokool in an attack upon Kumnalli which deprived her of life, it would be presumed against them that they intended the natural consequences of the attack. But here the case is not so. It was night, and there is nothing to shew that they were aware of the character of the blows actually inflicted by Gokool, while it is reasonably clear that their common purpose at the beginning was the innocent purpose of protecting their property. In carrying this out, they probably went a step farther than the strict letter of the law would allow; they desired to inflict, and intended to aid in inflicting chastisement upon the offender. Still, on the whole, I cannot bring myself to conclude that they were guilty of a higher offence than an assault. But the actual striker of the blows is very differently situated. The medical evidence shews that these were of a very brutal nature. The shoulder blade was fractured. The ulna of each fore-arm was broken. The phalanx of the left ring finger was also broken. There were contusions and abrasions all over the body, and the

marks of two severe blows on the head; death ensued within a few hours, and was, without the least doubt, caused by the beating. The woman was not laboring under any disease, all her organs appear to have been perfectly healthy; on the other hand, she was very slightly formed, in a half-starved condition of body. Probably, too, no single one of the injuries inflicted, unless it were the blow on the head, would of itself have proved mortal. But, notwithstanding these latter considerations, I feel that there is no reasonable ground upon which I can withhold the conclusion that Gokool must have known when he was so barbarously using the poor old woman that he was thereby likely to cause her death; he must have known that his blows were collectively so imminently dangerous that they would in all probability cause such bodily injury as is likely to cause death. They did, in fact, cause death, and I must therefore find him guilty of murder, unless I can give him the benefit of one of the exceptions laid down in the Penal Code. The only exceptions which are in any way applicable to the case are the *first* and *second*. The *first* provides "that culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation. Now, I certainly cannot say that the wretched Kumnalli gave Gokool grave and sudden provocation to beat her to death. In the *first* place, the provocation was not *sudden*, because Gokool by his own account *expected* to find somebody stealing his paddy; and, in the *next* place, it was not in my judgment (notwithstanding the very considerable value of the paddy to a poor man in a time of famine prices) so grave as to have reasonably deprived him of the power to moderate his blows. I am of opinion that it is not every case where self-control is lost which is protected by this exception, but only such cases as exhibit a provocation, which would, in the common course of things, be expected *a priori* to deprive the offender of self-control to a sufficient extent to admit of the fatal act being committed. The *second* exception provides that culpable homicide is not murder "if the offender in the exercise in good faith of the right of private defence of person or property exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the

purpose of such defence." With regard to this I need not explain what I conceive to be the proper scope of these words. It appears to me sufficient to remark that in this case the mere defence of the paddy certainly did not at most require more than a very slight imposition of hands. The injuries inflicted by Gokool were not simply an excess beyond what the law would have allowed for the purpose of such defence, but were altogether done beyond the pale of the law. In my opinion, therefore, neither exception shelters Gokool, and I am obliged to find him guilty of murder. Under all the circumstances of the case, however, I think that the extreme sentence of the law passed by the Sessions Judge is too severe, and I would commute it to transportation for life. The other two prisoners ought, in my opinion, to be acquitted.

Campbell, J.—I take the same general view of the facts as my learned colleagues. I have little doubt that, in truth, the deceased was detected stealing the prisoner's grain, and that on the impulse of irritation caused by her act she was very violently and brutally assaulted, and died in consequence.

The Judge does not give any good reason for the view which he takes, and, while condemning the Magistrate, does not, in fact, suggest any hypothesis whatever on which his own contrary view is founded. All question of deliberate assassination is, I think, clearly and positively negatived by the evidence. It is wholly impossible to suppose that, if the prisoners had planned the murder of the deceased, and waylaid her for the purpose, as assumed in a bare and unexplained way by the Judge, they would have openly brought her home to their house in the presence of her daughters, and tried to revive her by washing and warming her, as distinctly stated by the real prosecutrixes before the Magistrate. It seems to be perfectly clear that the prisoners had no intention of killing the deceased, but that one or all of them did brutally beat her, and so intentionally cause such severe injuries as were likely to cause death, and did, in fact, cause death, thereby committing culpable homicide of one kind or other.

As respects the guilt of the individual prisoners, Mr. Justice Phear has already written a judgment in which he enters so fully into the matter that I have only to express my general concurrence in his view of the evidence. The only evidence against

Kishto and Oodoy is that of the woman Daro. Unless in the capacity of a co-thief (as suggested by Mr. Justice Phear), I should doubt her having really witnessed the assault at all. I can hardly imagine an attack of this kind to take so long that Daro could have come out of the village and actually witnessed it. If she was not one of the thieves who fled rapidly, I deem it quite as likely that she merely found the prisoners bringing home her mother, and, learning what had occurred, accused the whole family of the deed. At any rate, I do not think this woman's evidence sufficient to convict the prisoners Kishto and Oodoy, and I would release them.

It must be remembered that the first prisoner, Gokool, has throughout consistently stated that he struck the deceased five or six blows with his stick, and that he alone did so. Severe as the injuries are, I see nothing incredible in the statement of this man that he inflicted them by repeated blows.

The question remains, of what offence was Gokool guilty, *i. e.*, of culpable homicide only, or of culpable homicide amounting to murder?

In my view, the definition of murder in the Penal Code (which ties our hands, takes away judicial discretion, and renders necessary a very severe sentence for that offence) should be strictly and exactly construed. We are not to introduce any of the presumptions of law which, in regard to the offence of murder, have in England established a wide variance between law and fact, and have rendered murder in many cases as it were an artificial offence of a complicated and embarrassing character (*see the late Report of Her Majesty's Commissioners on the subject*). We are not, as I think, to presume that a man intended or knew the consequences of his acts, unless, looking to the whole evidence, we believe that he actually did know them. In this knowledge is one of the main distinctions between culpable homicide and murder. The prisoner Gokool intended to inflict blows on the deceased, and such blows were likely to cause death. That is culpable homicide. If it further appears that he knew that the blows were likely to cause death, then the culpable homicide is murder. But I construe the word "know" to signify a real and actual knowledge present to the mind at the time—not a constructive knowledge. If we suppose that Gokool, when

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Again, independent of knowledge, if the blows intentionally inflicted were not only dangerous, but, more than that, were sufficient, in the ordinary course of nature, to cause death, the offence would be murder. Here I have considerable doubt upon the medical evidence. It is clear that none of the wounds were what would be called "mortal wounds," and the medical evidence leads me to doubt whether, combined, they would have been mortal to a man or woman in ordinary health: for the medical officer explains that he believes death to have resulted from the shock to the system of a person in the peculiarly weak and ill-nourished condition in which he describes the deceased—a condition which the prisoner, in the moment of catching a thief, could not know.

Further, it seems to me that the case comes under Exception 1, Section 300 of the Penal Code. The effect of that Exception appears to me to be that, when a homicide is committed without premeditation upon the passionate impulse of serious provocation, it is not murder, but what would be called in England "manslaughter" and under the Code is "culpable homicide." In the case, then, of a poor man whose early rice in these days of scarcity is peculiarly valuable to him, and who, after working in the day, is compelled by repeated thefts to sit up and watch it, who catches a thief in the act of stealing that rice, and who, on the impulse of the moment, rushes at the thief, and belabours him with a stick in a fatal way, is there not really grave and sudden provocation? Did he not act on the passionate impulse there resulting? I think that he did. In my view, then, this man who detects a thief stealing his rice, and who, acting on the sudden impulse of the moment, inflicts on her blows so severe as to be likely to cause death, but which he did not at the time know or feel to be likely to cause death, and which would not necessarily have caused death to a person in ordinary health, but which, owing to abnormal weakness in the deceased not known to him, did cause death—this man is on several grounds not guilty of murder, but only guilty of culpable homicide. The result will be that, under the sentence of Jus-

tices Norman and Phear, Gokool prisoner will be transported for life on the conviction of murder, while Kishto and Oodoy will be released on the concurrent order of Justice Phear and myself.

The 27th February 1866.

Present :

The Hon'ble F. A. Glover, *Judge*.

Appeal (after time)—Rejection of.

Queen versus Hulodhur Ghose and others.

Committed by the Assistant Magistrate, and tried by the Officiating Sessions Judge of Nuddea, on a charge of dacoity.

An appeal preferred out of time and without any explanation of the delay may be rejected at once under Section 415 of the Code of Criminal Procedure.

THIS appeal has been preferred out of time, and might, therefore, as no explanation of the delay has been given, be rejected at once under Section 415 of the Code of Criminal Procedure.

I have, however, gone over the Sessions Judge's charge. All the evidence appears to have been fully and carefully laid before the jury; and, as a majority found all the prisoners guilty, there is (no point of law being either raised or involved) no ground for interference.

The appeal must be rejected.

The 8th February 1866.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Murder—Grievous Hurt—Referred case (Power of High Court as to wrong conviction in).

Queen *versus* Sheikh Solim, Bysagoo, Sheikh Bengoo, and Sheikh Koreem.

Committed by the Magistrate, and tried by the Sessions Judge of Mymensing, on a charge of culpable homicide not amounting to murder, &c.

It is not murder, if a person kills another without intending to take his life, and if the acts done are not such as conclusively indicate an intention to cause such injury as was likely to cause death.

In a referred case, and not an appeal, if the High Court deems a conviction wrong, the only course open to it is to annul the conviction, and order a new trial for the proper offence.

THIS is a case referred to the High Court by the Court of Session for confirmation of the sentence of death which has been passed upon four prisoners who have been convicted of murder. After reading the whole of the evidence, and giving the case the fullest consideration, the conclusion at which we arrive is that we cannot confirm the sentence, and that the conviction for murder is wrong. There is no question that the deceased was treated by the prisoners in a very cruel and barbarous manner, and that he died in consequence of that treatment. Nevertheless, we think it clear that the acts of the prisoners were not accompanied by that *intent* or that *knowledge* which are essential under the Penal Code to the offence of murder.

The deceased was caught the night before his death in a house which he had entered for the purpose of committing theft. The owner of the house, after being seriously wounded by the deceased, secured him. In the morning the headmen of the village were sent for, and, having come and seen the thief, went away, leaving him in charge of the village chowkeedar. The deceased was then sitting in the verandah or door-way of the house, where he was caught; one hand was loose, the other hand and his feet were tied, and the end of a rope which was passed round him was secured to one of the beams or posts of the house. The chowkeedar being left in charge, many of the neighbours appear to have come to look at the thief, and amongst others came the four prisoners. Then commenced the ill-treatment, of which the deceased eventually died.

On the evidence, it seems clear that all the prisoners at intervals struck the deceased with their fists and kicked him, and the prisoner Bysagoo (and probably also the prisoner Bengoo) also struck the deceased with a *pera*, a small wooden foot-stool, which was lying close by; one or two very violent blows were struck with the *pera*, and by one of them the nose of the deceased was broken. It is this use of the *pera* which, in our opinion, alone affords any sort of evidence on which a conviction of murder could be based. But, considering the nature of the instrument (the Sessions Judge, who saw it, says it was not a heavy one), we do not think that its use necessarily leads to the conclusion that the person using it did so with the intent or knowledge necessary to constitute murder. The medical evidence shows that the deceased did not die from the effect of any one blow, but that he sank from the shock which his system received from the continued pommelling and blows, which were such as to cause considerable internal injuries, although no one of these injuries in itself would have caused death. Throughout the ill-treatment the chowkeedar (who is one of the witnesses for the prosecution) stood by and never assisted the deceased in the least. In the course of a couple of hours, the deceased became insensible, and soon after died. Looking at all the circumstances, we cannot concur with the Sessions Judge in the finding that the prisoners acted, as they did, with the intention of causing death, or with the intention of causing such bodily injury as was likely to cause death, or with the knowledge that they were likely by such acts to cause death. Without such intent or knowledge the prisoners have not committed the offence of culpable homicide (Section 299), and consequently have not committed the offence of murder (Section 300). As it appears to us, the prisoners ought to have been tried and convicted on a charge of voluntarily causing grievous hurt, which offence they did commit, inasmuch (even supposing there were no other evidence of it) as the bone of the nose of the deceased was broken. They did intend to beat the deceased severely, and did commit grievous hurt, and they should be punished accordingly. But they did not intend to take the man's life, and the acts they did are not such as conclusively indicate an intention to cause such injury as was likely to cause death. The whole occurrence took place in the presence of the

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Vol. V. chowkeedar, whose conduct was as bad as possible, and it appears to have commenced with the prisoner Solim, who struck and kicked the deceased on his saying to the chowkeedar that it was he (Solim) who had instigated him to the theft. Bengoo, on coming in, said: "We work all day, and this wretch will not let us sleep at night," and then struck him. And so it went on till the deceased sank under it. Barbarous as were the acts of the prisoners, we cannot say that we think they amount to murder.

As we think the conviction is wrong, the only course open to us, under Section 399 of the Criminal Procedure Code, is to annul the conviction, and order a new trial for voluntarily causing grievous hurt to the deceased.

We regret that, as the minor offence for which we think the prisoners ought to have been tried is in fact included in the major offence for which they have been found guilty, we cannot at once alter the conviction and sentence, and so dispose finally of the case. But it seems to us that, as this is a *referred case*, and not an *appeal*, Section 399 makes it imperative on us to annul the conviction, and order a new trial. We cannot deal with the case as a Court of Revision, for none of the Sections applicable to revision contemplate a case such as this. And Section 426 does not in any way assist us, because we have not in this case before us either on appeal or revision.

The conviction and sentence are annulled, and a new trial is directed for voluntarily causing grievous hurt.

The 12th February 1866.

Present:

The Hon'ble J. P. Norman and G.
Campbell, *Judges*.

**Murder—Culpable Homicide not amounting to
Murder—Actual, not constructive, intention.**

Queen versus Gureeboollah, Appellant.

*Committed by the Magistrate, and tried by
the Sessions Judge of Backergunge, on
a charge of murder, &c.*

Under the Penal Code, no constructive, but an actual,
intention to cause death is required to constitute mur-

der. Thus, where a lad of 15 years, in the heat of discovery of the deceased in the act of adultery with a near relative's wife, and, without the use of any lethal or other weapon, joined that relative in committing an assault on the deceased who died from the effects thereof: **HELD** that the offence committed was culpable homicide not amounting to murder.

In this case, it is found by the Court of Session that Surat and Gureeboollah (appellant) together inflicted on deceased such injuries as they knew to be likely to cause death, and which, in fact, did cause death. The Sessions Judge finds that in truth the assault was committed in consequence of the discovery of deceased in the act of adultery with Surat's wife, and in the heat of that discovery. This he considers a sufficient provocation to reduce the offence to culpable homicide in the case of Surat the husband, but not in that of Gureeboollah. He accordingly sentences Surat to one year's imprisonment for culpable homicide, and Gureeboollah, a lad of 15, to transportation for life for murder! We think that this is one of the cases in which Sessions Judges seem of late to have a good deal overstrained the Law of Murder. Under the Penal Code, no constructive, but an actual, intention is required. It is admitted that the prisoners had no intention to cause death, and there is much in the evidence (*e. g.*, the treatment of the deceased after the beating, the sending for his mother and for a doctor, &c.) to negative the theory that they knew they were likely to cause death. At any rate, it may be doubted whether the appellant, a lad of 15, really knew it. Moreover, we think that, as it is shown that the lad Gureeboollah was with Surat at the time of the discovery of the wife's adultery, and that he was a near relation of Surat's, there was sufficient provocation in his case also to excuse or mitigate his conduct in assisting Surat to beat the deceased. In this case, there is no evidence of the use of any weapon of a lethal character, or, in fact, of any weapon. Still the injury actually inflicted was so severe that we are not prepared positively to say that the conviction is wrong to the extent of culpable homicide, but we do not think that the homicide amounts to murder. We accordingly, so far, alter the conviction, and, in place of the sentence passed on Gureeboollah, pass a sentence of one year's rigorous imprisonment.

The 26th February 1866.

Present :

The Hon'ble L. J. Jackson and F. A. Glover, Judges.

Forgery in Civil Court (before 1st January 1862)—Criminal prosecution how to be instituted.

Queen *versus* Enayet Hossein.

Committed by the Judge of Patna on a charge of forgery.

In a case of filing a forged *vakalutnamah* in a Civil Court before 1st January 1862, the prosecution can only proceed in the ordinary way, *i. e.*, by way of commitment by a Magistrate on the complaint of the party aggrieved.

THIS is an application complaining of an order of the Judge of Patna, by which the petitioner, Enayet Hossein, has been committed for trial on a charge under Section 471 of the Indian Penal Code.

The commitment has been made by the Judge himself under Section 173 of the Criminal Procedure Code.

* * * *

The charge relates to a *vakalutnamah* filed in the name of certain defendants in a suit where Enayet Hossein, the petitioner, was plaintiff in 1858, under which a confession of judgment was entered, and decree accordingly passed against the defendants.

A suit was afterwards brought to set aside this decree as obtained by fraud, and the High Court, in giving judgment on appeal in the case (14th September 1864), ordered enquiry into the circumstances with a view, no doubt, to a criminal prosecution being instituted.

The Judge has gone very fully into the enquiry—as fully, it seems, as if he was trying the charge of forgery or using forged documents—and has committed the petitioner for trial.

The objections to this commitment are two—*first*, that, as the offence (if any) was committed in 1858, the provisions of Chapter XI. of the Code of Criminal Procedure will not apply; *secondly*, that, if they did, the Zillah Judge was not the proper authority to make the commitment, inasmuch as his Court was not the “Court of Civil Judicature

before which the offence was committed” (Section 173, Code of Criminal Procedure). Vol. V.

We think both these objections are valid.

On the *first* point we follow the precedent at Vol. V., Weekly Reporter, p. 8, in the case of Radha Jewun Mustafec, petitioner (Phear and Glover, Judges), where, in an analogous case, it was held that, with advertence to the provisions of Act I. of 1848 (which was held to apply), the prisoner could not be brought to trial otherwise than with the sanction of the Court before which the forgery was committed; and that the sanction of the Superior Court, which, by the wider terms of the Criminal Procedure Code, Section 170, would be sufficient, could not be lawfully given in case of a forgery committed before the 1st of January 1862, and was, therefore, inoperative.

In that view we concur, and we are of opinion that the present case also must be governed by the rules of criminal procedure as they stood previously to the coming of the new Code into operation.

The case before us was not a case to which Act I. of 1848 applied, because, as held by the late Court of Nizamut in several cases (which may be found in Mr. Beaufort's very useful Digest), that law referred only to “Deeds and Papers offered in evidence against the adverse parties,” and did not extend to *vakalutnamahs* alleged to have been fabricated.

In such a case, the prosecution would proceed in the ordinary way, *viz.*, by way of commitment by a Magistrate on the complaint of the party aggrieved.

The commitment by the Judge in the present case was, therefore, wholly without jurisdiction.

And on the *second* head of objection, it appears that the *vakalutnamah* was filed and possibly “used” within the meaning of Section 471 of the Indian Penal Code in a subordinate Civil Court (that of the Principal Sudder Ameen), and not in that of the Judge.

If, therefore, Section 173 applied to the case, it would be the Principal Sudder Ameen, not the Zillah Judge, who could commit. But it is doubtful whether the terms of this Section, any more than those of Section 1 of Act I. of 1848, apply to a case like this.

Vol. V. For these reasons, finding the order of commitment made by the Judge to be made without jurisdiction, we order that it be quashed, and that all proceedings thereon be stayed.

The 3rd March 1866.

Present :

The Hon'ble G. Campbell and F. A. Glover,
Judges.

Defamation—Proof of publication (Despatch by Post).

Queen versus Kally Doss Mitter and others.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of defamation.

In a case of defamation, proof of despatch by post to a certain district of the paper containing the defamatory matter is tantamount to proof of publication thereof in that district.

THIS case turns on the question whether or not the Editor of the Dacca Newspaper sent a copy by post to Backergunge, where it would, in the due course of events, be opened and read. If it were proved that he did so send the paper, he would in law be considered as having published it in the Backergunge District (*vide* this Court's Ruling, No. 1043, 14th December 1863).

The Joint Magistrate appears to have taken up this question, and to have decided it in favor of the defendants, on the ground that there was no proof of the Editor's having posted the newspaper to the address of the witnesses in Backergunge. This finding may very probably not be justified by the facts of this case; still it is a finding on evidence with which this Court cannot interfere under Section 434 of the Criminal Procedure Code.

The 3rd March 1866.

Present :

The Hon'ble A. G. Macpherson and F. A. Glover,
Judges.

Transportation—Imprisonment.

Queen versus Shonaullah and Adoo.

Committed by the Magistrate of Fureedpore, and tried by the Sessions Judge of Dacca, on a charge of hurt and rape, &c.

A sentence of transportation cannot be less than 7 years. To bring Section 59 of the Penal Code into operation, the punishment awarded in each offence alone must be not less than 7 years' imprisonment. A general sentence of transportation for two or more offences, when only one of the punishments awarded is 7 years' imprisonment, is illegal.

WE think the evidence in this case sufficient for conviction, and see no reason to interfere with the Sessions Judge's order so far.

But it has been frequently ruled by this Court (*Queen versus Motee Kora*, 2 W. R., p. 1) that a sentence of transportation cannot be for less than 7 years, and that, to bring Section 59 of the Penal Code into operation, the punishment awarded in each offence alone must be not less than seven years' imprisonment. A general sentence of transportation for two or more offences, when one only of the punishments awarded is seven years' imprisonment, is illegal. We desire to know whether any notice has been taken of what appears to have been great negligence on the part of the police in not taking up this case for nearly a month after it was reported at the station. A charge of such gravity, involving rape, hurt, and robbery, should have been investigated at once, and not have been postponed under any circumstances.

The convictions are affirmed, but the sentence is altered in the case of both prisoners to seven years' transportation on the first, and five years' rigorous imprisonment on the others.

The 3rd March 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor and J. P. Norman, *Judges*.

Distinctions between Murder and Culpable Homicide—Also between Appeal and Revision—Powers of High Court as a Court of Revision—Abetment.

Queen versus Gora Chand Gopee and others.

Committed by the Magistrate, and tried by the Sessions Judge of Mymensingh, on a charge of murder, &c.

Several important distinctions pointed out between murder and culpable homicide.

Sections 407 and 419 of the Code of Criminal Procedure are not applicable to a case which the High Court, as a Court of Revision, thinks it right to take up. The difference between appeal and revision explained.

The High Court, as a Court of Revision, can interfere with a judgment of acquittal or conviction, and can also enhance punishment.

The High Court can act as a Court of Revision, after it has acted as a Court of Appeal, in order to correct an error in law which could not be set right on appeal.

The High Court, as a Court of Revision, cannot reverse the finding of a Jury.

If several persons go out together to apprehend a man and take him to the Thannah on a charge of theft, and some of the party in the presence of the others assault and ill-treat the man, all present do not necessarily by their presence assist every act done, nor are consequently liable as principals.

Peacock, C. J. (Trevor and Norman, JJ., concurring).— THERE are, in my opinion, several important distinctions between murder and culpable homicide. An offence cannot amount to murder unless it falls within the definition of culpable homicide: for Section 300 merely points out the cases in which "culpable homicide is murder." But any offence may amount to culpable homicide without amounting to murder.

Culpable homicide is not murder if the case falls within any of the exceptions mentioned in Section 300.

The causing of death by doing an act with the intention of causing death is culpable homicide. It is also murder, unless the case falls within one of the exceptions in Section 300.

Causing death with the intention of causing bodily injury to any person, if the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, in my opinion, falls within the words of

Section 299 "with the intention of causing such bodily injury as is likely to cause death," and is culpable homicide. It is also murder, unless the case falls within one of the exceptions in Section 300, Clause 3.

Causing death by doing an act with the knowledge that such act is likely to cause death is culpable homicide, but it is not murder even if it does not fall within any of the exceptions mentioned in Section 300, unless it falls within Clause 2, 3, or 4 of Section 300, that is to say, unless the act by which the death is caused is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or with the intention of causing bodily injury to any person; and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or unless the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death.

In speaking of acts, I, of course, include illegal omissions.

There are many cases falling within the words of Section 299 "or with the knowledge that he is likely by such act to cause death" that do not fall within the 2nd, 3rd, or 4th Clause of Section 300, such for instance as the offences described in Sections 279, 280, 281, 282, 284, 285, 286, 287, 288, and 289, if the offender knows that his act or illegal omission is likely to cause death, and if in fact it does cause death. But, although he may know that the act or illegal omission is so dangerous that it is likely to cause death, it is not murder, even if death is caused thereby, unless the offender knows that it must in all probability cause death, or such bodily injury as is likely to cause death, or unless he intends thereby to cause death or such bodily injury as is described in Clause 2 or 3 of Section 300.

As an illustration, suppose a gentleman should drive a buggy in a rash and negligent manner, or furiously along a narrow crowded street. He might know that he was likely to kill some person, but he might not intend to kill any one. In such a case, if he should cause death, I apprehend he would be guilty of culpable homicide not amounting to murder, unless it should be found as a fact that he knew that his act was so imminently dangerous that it must in all probability cause death or such bodily injury, &c., as to bring the case within

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Vol. V. the 4th Clause of Section 300. In an ordinary case of furious driving, the facts would scarcely warrant such a finding. If found guilty of culpable homicide not amounting to murder, the offender might be punished to the extent of transportation for ten years, or imprisonment for ten years with fine (*see* Sections 304 and 59); or, if a European or American, he would be subject to penal servitude instead of transportation. It would not be right in such a case that the offender should be liable to capital punishment for murder. The first part of Section 304 would not apply to the case. That applies only to cases which would be murder if not falling within one of the exceptions in Section 300. If a man should drive a buggy furiously, not merely along a crowded street, but intentionally into the midst of a crowd of persons, it would probably be found as a fact that he knew that his act was so imminently dangerous that it must in all probability cause death or such bodily injury, &c., as in Clause 4, Section 300.

From the fact of a man's doing an act with the knowledge that he is likely to cause death, it may be presumed that he did it with the intention of causing death, if all the circumstances of the case justify such a presumption; but I should never presume an intention to cause death merely from the fact of furious driving in a crowded street in which the driver might know that his act would be likely to cause death. Presumption of intention must depend upon the facts of each particular case.

Suppose a gentleman should cause death by furiously driving up to a Railway Station. Suppose it should be proved that he had business in a distant part of the country, say at the opposite terminus; that he was intending to go by a particular train; and that he could not arrive at his destination in time for his business by any other train; that at the time of the furious driving it wanted only two minutes to the time of the train's starting; that the road was so crowded that he must have known that he was likely to run over some one, and to cause death. Would any one under the circumstances presume that his intention was to cause death? Would it not be more reasonable to presume that his intention was to save the train? If the Judge or Jury should find that his intention was to save the train, but that he must have known that he was likely to cause death, he would be guilty of culpable homicide amounting to murder, unless they should also find that the risk of causing of

death was such that he must have known, and did know, that his act must in all probability cause death, &c., within the meaning of Clause 4, Section 300.

If they should go further, and infer from the knowledge that he was likely to cause death, that he intended to cause death, he would be guilty of murder, and liable to capital punishment.

It appears to me that the rules contained in Sections 407 and 419 of the Code of Criminal Procedure are not applicable to a case which the Court, as a Court of Revision, thinks it right to take up.

An appeal is a matter of right in all cases in which an appeal is given, but a revision is in the discretion of the Court. An appeal is for matter of fact as well as for matter of law. A revision is only on matter of law. The two cases, therefore, are very different.

When Section 407 says that an appeal shall not lie from a judgment of acquittal, it means that the prosecutor shall not, as a matter of right, be entitled to apply to reverse the judgment of acquittal, either upon the facts or upon the law. But Section 404 authorizes the Court to call for and examine the record of any criminal trial in which it shall appear that there has been error in the decision upon a point of law, and may determine any point of law arising out of the case, and thereupon pass such order as to the Court may seem right. Section 405 enacts that it shall be lawful for the Court to call for and examine the record of any case tried by a Court of Session for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed, and as to the regularity of the proceedings of the Court. If it appear to the Court that the sentence passed is too severe, the Court may pass any mitigated sentence warranted by law. If the Court shall be of opinion that the sentence or order is contrary to law, the Court shall reverse the sentence or order, and pass such judgment, sentence, or order, as to the Court shall seem right, or, if it deem necessary, may order a new trial. The word "sentence" in the latter Section may mean the award of punishment merely, or the whole judgment including the finding. If it refers only to the award of punishment, the finding would stand; and I can scarcely see the necessity or use of the words "or may order a new trial." The words "sentence or order" are in many Sections used as including the finding, and not merely the award of punishment (Sections 415, 416, 417, 420); but whatever may be

the construction of the word "sentence" in Section 405, there can be no doubt that, under Section 404, the Court may set aside a judgment of acquittal for error in point of law. Suppose the decision of a Judge should be monstrously absurd. Suppose, upon an indictment for murdering a child, the Judge and the Assessors should find that the prisoner caused the death of the child by doing an act with the intention of causing its death, and that the case did not fall within any of the exceptions mentioned in Section 300 of the Penal Code. But suppose they should also find that the child was under the age of six months, and the Judge should hold that it was not murder to kill a child under that age, and should, therefore, acquit the prisoner, and order him to be discharged, could it be contended that the judgment of acquittal could not be set aside, and that the prisoner should go free for ever? I apprehend that the Court, as a Court of Revision, would clearly have the power to set aside the judgment of acquittal, and declare that, upon the facts found, the prisoner was guilty of murder, and sent the case back to the Judge, ordering him to apprehend the prisoner (if he had been discharged), and to pass the proper sentence upon him.

If, in the case above supposed, the Judge were to say it is not necessary to try whether death was caused by an act done with the intention of causing death, because, if it was so caused, the prisoner was not guilty of murder, I find that the child was under the age of six months, and, therefore, acquit the prisoner. In such a case, there would be no finding on the facts, and the Court, as a Court of Revision, would merely set aside the acquittal, and order a new trial. I have supposed an error in law which is not likely to occur. I put it merely as an illustration. There are many constructions of law equally erroneous, though not so clearly so.

Again, suppose a Magistrate, in a case triable by him, should convict of an offence, and the Sessions Judge on appeal should, without going into the facts, reverse the decision upon a point of law, and order the prisoner to be discharged, stating that, assuming the facts to be as found by the Magistrate, the prisoner was not guilty of an offence. This Court, if the Judge were wrong in point of law, could, as a Court of Revision, reverse his decision, and direct him to try the appeal upon its merits.

If a Judge on appeal should uphold the finding of a Magistrate on the facts, and reverse his decision on a point of law, and pronounce a judgment of acquittal, and order the prisoner to be discharged, then, as the acquittal would be merely on a point of law, this Court, as a Court of Revision, might reverse the judgment of acquittal, and order the sentence of the Magistrate to stand.

There are also cases in which, notwithstanding Section 419, the Court, as a Court of Revision, could enhance a punishment.

In the case of *Bourne versus the King* (9 Adolphus and Ellis's Reports, p. 58) it was held that a sentence of transportation for an offence for which the only punishment was death was erroneous, and must be reversed. The Court held that they could merely reverse the erroneous sentence, but could not pass the right one, and the prisoners were discharged.

The law was amended by 11 and 12 Vict., c. 78, by which the Court, upon reversing an erroneous sentence, may give the proper judgment. Here, under Section 405, the Court, as a Court of Revision, has a similar power; but, in order to do so, it may be necessary to enhance the punishment. In the case suggested by Mr. Justice Campbell, if a Sessions Judge should pass sentence of rigorous imprisonment for 14 years for murder, such a sentence would be bad, for it is not authorized by law (Section 302 of the Penal Code); or, if he should pass sentence of transportation for 7 years for the offence of murder committed by a person under sentence for transportation for life, the sentence would be contrary to law (see Section 403, by which death is the only punishment which can be awarded).

In such cases, the Court, as a Court of Revision, could under Section 405 reverse the sentence, and pass the proper sentence, notwithstanding that in such a case the sentence must be enhanced in order to pass a legal sentence—in the former case from 14 years' rigorous imprisonment to death or transportation for life—and in the latter from transportation for seven years to sentence of death. Section 405 says: "If the Court shall be of opinion that the sentence or order is contrary to law, it shall reverse the sentence or order, and pass such judgment, sentence, or order as to the Court shall seem right, or, if

Vol. V. it deem it necessary, may order a new trial."

In the case supposed in which a prisoner under sentence or transportation for life should be found guilty of murder, and sentenced to transportation for 7 years, the Court might think the finding right upon the evidence, and there would, therefore, be no necessity for ordering a new trial. In such a case, a question might arise whether the Court would be bound to pass the only legal sentence, *viz.*, death, or might send the case back to the Sessions Judge to pass the sentence. I am of opinion that the Court might send the case back with an order to pass the proper sentence under the words "shall pass such judgment, sentence, or order," &c.

In the case supposed, of a prisoner being sentenced to 14 years' rigorous imprisonment for murder, upon setting aside the erroneous sentence, the right sentence would be a discretionary one, *viz.*, "death or transportation for life." In such a case, I think, the Court ought to send the case back for proper sentence to be passed in the same manner as it would do under Section 402.

By the Statutes 11 and 12 Vict., c. 78, s. 5, the Court, when it reverses a judgment, may either pass a proper judgment, or remit the case to the Lower Court, in order that such Court may pass the proper judgment. It appears to me that in all cases in which the Court as a Court of Revision thinks it right to reverse an acquittal on a point of law, or to reverse as erroneous a sentence, in order that the right sentence may be passed, if the right sentence would enhance the one already passed, the offender should have an opportunity of being heard by himself, or his pleader or agent, either before the Lower Court if the case is remitted to it, or before the High Court if the Judges pass the proper sentence themselves.

The Court may act as a Court of Revision after it has acted as a Court of Appeal, if it found it necessary to do so in order to correct an error in law which cannot be set right on appeal.

For instance, if a man should be found guilty of a murder, and sentenced to 7 years' transportation, if the prisoner should appeal on the facts, the Court might uphold the finding of guilty of murder on appeal, and afterwards, as a Court of Revision, might set aside the sentence of 7 years' transportation, and pass a legal sentence for murder, or send it back to the Lower Court to pass

such sentence, pointing out, as they would in a case under Section 402, what is the proper punishment.

As a Court of Revision, the Court cannot reverse the finding of a Jury.

In the present case, the attention of the Judge should, I think, be called to another error which he committed. He says, the prisoners who were present assisting in taking away Oomadee, and assisting by their presence in the beating of him, abetted the commission of culpable homicide not amounting to murder.

It does not follow that, because they were present with the intention of taking him away, they assisted by their presence in the beating of him to such an extent as to cause death.

If the object and design of those who seized Oomadee was merely to take him to the Thannah on a charge of theft, and it was no part of the common design to beat him, they would not all be liable for the consequence of the beating merely because they were present. It is laid down that, when several persons are in company together engaged in one common purpose, lawful or unlawful, and one of them, without the knowledge or consent of the other, commits an offence, the others will not be involved in the guilt, unless the act done was in some manner in furtherance of the common intention.

It is also said that, although a man is present when a felony is committed, if he takes no part in it, and does not act in concert with those who commit it, he will not be a principal merely because he did not endeavour to prevent it or to apprehend the felon.

But if several persons go out together for the purpose of apprehending a man, and taking him to the Thannah on a charge of theft, and some of the party in the presence of the others beat and ill-treat the man in a cruel and violent manner, and the others stand by and look on without endeavouring to dissuade them from their cruel and violent conduct, it appears to me that those who have to deal with the facts might very properly infer that they were all assenting parties and acting in concert, and that the beating was in furtherance of a common design. I do not know what the evidence was; all that I wish to point out is that all who are present do not necessarily assist by their presence every act that is done in their presence, nor are consequently liable to be punished as principals.

The 5th March 1866.

Present :

The Hon'ble I. S. Jackson and F. A. Glover, *Judges*.

House-breaking and Theft—Punishment for.

Queen versus Chytun Bowra and others.

Committed by the Assistant Commissioner, and tried by the Judicial Commissioner of Chola Nagpore, on a charge of house-breaking, &c.

A person convicted of house-breaking, followed immediately by theft, is punishable only under Section 57 of the Penal Code.

THE point has been frequently ruled. A prisoner convicted of house-breaking, followed immediately by theft, would be punished under Section 457 of the Penal Code only *vide* Circular Letter, 1842, 6th December 1864; and decisions of High Court, 25th January 1865).

The Assistant Commissioner's order was, therefore, wrong; and, as the prisoners have already been whipped for theft, they must now be released, as only one punishment could legally have been inflicted.

The 5th March 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell, *Judges*.

Receiving stolen property—Jurisdiction.

Queen versus Ghusoo Khan.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of dishonest retention of stolen property with guilty knowledge.

To make it legal to punish at *P* a prisoner committed at *C* on a charge of receiving stolen property, the finding must be that the property was stolen at *P*.

Campbell, J.—THE prisoner has been convicted by a Jury, and urges no ground of law in his appeal. The only point on which I have any doubt is, that there seems to be some want of the precision in the

finding which would be strictly necessary to make it legal to punish the prisoner at Patna for an offence committed in Calcutta, *viz.*, receiving stolen property. To give jurisdiction at Patna under Section 31 of the Code of Criminal Procedure, it would seem to be necessary that the property was stolen in Patna, that is in this case that it was the stolen property of Alee Sheikh and Ahad Shah, as alleged by the prosecution; whereas the finding is in very general terms that the prisoner "received stolen property having reason to believe the same to have been acquired by theft." I call for the papers, and when they come, the case will be laid before the 4th Bench.

Norman and Campbell, JJ. The papers have been received. The evidence shews the property to have been stolen at Patna, and, although not directly expressed in words, we may consider that the finding of the Jury was in effect a finding that the property was the property stated by the witnesses to have been stolen in Patna. We dismiss the appeal.

The 5th March 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell, *Judges*.

Bribery—House-trespass—Extortion.

Referred under Section 434 of Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Government versus Mahomed Hossein and others.

Where a Constable and others enter a house and apprehend certain persons as gamblers, and afterwards release them on payment of a sum of money by the latter, the offence committed is not house-trespass and extortion, but taking a bribe as regards the Constable, and abetment of that offence as regards the others.

THIS is a case referred for the order of this Court by the Sessions Judge of Gaya under the 434th Section of the Code of Criminal Procedure. It appears that, on the 17th October last, certain *bunneahs*, who are the prosecutors in the case, were either writing their accounts, or gambling in the house of one of their number.

The prisoners, four in number, one of whom is a Constable, and one a Chowkeedar, knocked at the door, entered and apprehend-

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Vol. V. ed the *bunneahs* (as the Sessions Judge says, bound them with cords, though the Magistrate did not find that fact proved), and subsequently promised them that they should be released on paying 15 rupees, which was accordingly done.

The Joint Magistrate convicted the Constable of "taking a bribe" under Section 161 of the Penal Code, and the three other prisoners of "abetting" that offence.

The Sessions Judge suggests that this conviction is erroneous, and that the prisoners should have been convicted of "house trespass" and "extortion" under Sections 451 and 384 of the Penal Code.

We think it clear that the conviction is correct, and that the offence under Section 161 has been committed. We are by no means sure that the prisoners might not have been convicted of robbery under Section 390; but, as it is clear that the offence under Section 161 has been committed, we see no reason to interfere with the conviction, although we regret that the sentence, which is only 6 months' imprisonment, was not more severe.

The 6th March 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges*.

Seduction (of Wife during Husband's temporary absence).

Referred under Circular Order No. 17, dated the 17th June 1863, and Section 498 of the Indian Penal Code.

Mutty Khan versus Mungloo Khansama.

Enticing or taking away with a criminal intent a wife living in her husband's house, or in a house hired by him for her occupation and at his expense during his temporary absence, is punishable under Section 498 of the Penal Code, provided the seducer knew, or had reason to know, that she was the wife of the man from whose house he took her.

The sole point referred by the Assistant Magistrate is whether a woman, who "eloped with defendant from a house in the suburbs of Calcutta, hired for her by the complainant, her husband (who was absent in Assam)," could be said to have been "taken or enticed away from" her husband.

We have no doubt that the defendant, if under such circumstances he enticed or took away the woman, did entice or take her away "from her husband."

We cannot say, as the Sessions Judge says, that "a wife is always the property of her husband, whether he is absent or present;" but we think it quite clear that a wife living in her husband's house, or in a house hired by him for her occupation, and at his expense, is, during his temporary absence, living under his protection so as to bring the case within the meaning of Section 498—provided, of course, that (to make the defendant liable) he knew, or had reason to know, that she was the wife of the man from whose protection he took her, or on whose behalf the person from whom he took her had charge of her, and also provided that he took her with the intent specified in the Act.

To hold otherwise would be to declare the worst cases of seduction not punishable under the Penal Code.

Being, therefore, of opinion that the Assistant Magistrate's decision was wrong in law, and seeing that the offence was one which he could not try, we quash his order, and direct him to proceed according to law.

The 6th March 1866.

Present:

The Hon'ble F. A. Glover, *Judge*.

Jurisdiction—Commitment by Civil Court for Forgery—Esteppel.

Miscellaneous case.

Juggut Misser and others *versus* Baboo Lall and others.

A former decision in a civil suit, in which the issue was the genuineness or otherwise of a *kubooleut*, and the Court held that it was not genuine, but added (as an *obiter dictum*) that the *pottah* produced by the other side was authentic, does not bar the jurisdiction of a Civil Court in sanctioning a commitment for forgery in respect of the *pottah*.

The papers of this case were sent for by Mr. Justice Kemp and myself on the 15th of February last, and the record is now before the Court.

Mr. Stephen for the petitioner contends that the Court sanctioning the commitment had no jurisdiction, the case in which the *pottah* was presumed to be spurious having been already decided between the same parties, and on the same ground of action, in the Collector's Court, under Act X. of 1859.

This does not appear to be exactly the case. In the suit brought under Act X., the point for decision was whether a certain *kuboolent* was genuine or not, and the Court held that it was not genuine, adding that the *pottah* produced by the other side was authentic. Now, any opinion regarding the goodness or otherwise of the *pottah* was an "*obiter dictum*," the point for decision being not whether the *pottah* was genuine or not, but whether the *kuboolent* was so. It has been ruled in the case of Domanath Roy Chowdhry *versus* Rajanath Mitter and others (Hay's Reports, page 75), one on all fours with this, that a former decision, in which the issue was the *bona fides* or otherwise of a *kuboolent*, was not conclusive against a party suing to have a *pottah* cancelled, and that any remarks on the genuineness of the latter document in the former case were foreign to the issue, and did not prevent the subsequent civil suit.

It is true that the question as to the Civil Court's jurisdiction under Section 20 of Act VIII. of 1859 is now before this Court in special appeal, but, in the face of the judgment above quoted, it would not seem to be in any way necessary to delay the proceedings of the Criminal Courts pending the result of that appeal.

And, had the petitioner made out his case in other respects, I doubt whether, under any circumstances, the proceedings now going on before the Magistrate could be stayed, with advertence to the Full Bench ruling of the 31st of January last.

The 9th March 1866.

Present :

The Hon'ble L. S. Jackson and F. A. Glover, *Judges*.

Default (by Complainant's Witnesses)—Holding of Court in place not named in Summons.

Referred under Section 434 of Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Luckhim Molloo and others

versus

Gooroo Doss Mookerjee and others.

Where the default of complainant's witnesses was caused by the Deputy Magistrate shifting his Court

to a place different from that named in the summons—**Held** that it was irregular to throw out the case without giving them a second opportunity of appearing.

We think that the Deputy Magistrate's order has caused a failure of justice in this case. The complainants did all that the law required of them, and, as the default of their witnesses was caused by the Deputy Magistrate shifting his Court to a place different to that named in the summons, it was irregular to throw out the case without giving them a second opportunity of appearing.

We, therefore, quash the Deputy Magistrate's order, in concurrence with the recommendation of the Sessions Judge, and remand the case to the first Court for a proper and legal investigation.

The 10th March 1866.

Present :

The Hon'ble G. Campbell, *Judge*.

Evidence—Dacoity.

Queen versus Modhoo Manjee and others.

Committed by the Magistrate of Balasore, and tried by the Sessions Judge of Cuttack, on a charge of dacoity.

Nature of evidence requisite to be taken in a case of dacoity.

THIS is one of those cases which it is difficult to believe, and at the same time difficult to disbelieve. It seems very improbable that dacoits should in this unsettled country, where no open resistance is made to the Police, commit a dacoity, without the very least disguise, in a place where they were well known, upon persons who knew them well, in the presence of many spectators who also knew them well, and should be recognized and denounced as a matter of course.

In such a case a doubt always suggests itself whether the witnesses really did recognize the prisoners at the time, or whether they merely tell a story, which, on other grounds, they believe to be essentially true. Still, in this case, the evidence to recognition is unusually strong. It is to be observed, too, that the witnesses did not slavishly tell the same identical story. They do not all recognize exactly the same prisoners; and some of the variations, to my mind, tell in favor of their credibility, al-

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Vol. V. though, in the case of one or two witnesses, the variations were so excessive that, as the Sessions Judge says, their evidence cannot be relied on. The Sessions Judge has, up to a certain point, very carefully tried the case with a most anxious and impartial desire to do justice, and he thoroughly sifted the evidence for or against each prisoner. So far, then, I should see no ground for interference with the concurrent verdict of the Sessions Judge and Assessors; and, as respects the measure of punishment, it only seems to me that, under the very heinous circumstances of the case, the prisoners have perhaps been too leniently dealt with.

But there is one point on which it seems to me that the evidence is deficient, a point on which I must always absolutely insist in cases of this kind, namely, that it should be made clear exactly when and under what circumstances the prosecutor and witnesses denounced the persons whom they swear to have recognized. And in every case, now that we have not the old Form of Police Record, I consider that it should be an invariable rule that the whole facts and circumstances under which the case was brought to light should be proved in evidence. I regret to say that this is too often altogether wanting; we have not the old Police papers, and we have no evidence in their place. It is so notably in this case. The dacoity occurred on the 18th of July; the case was sent in by the Police on the 18th August, exactly one month later; but of all that occurred during that month, excepting only the formal searching of the houses, and how that search was brought about, does not appear. We have no evidence whatever.

Two Police Constables were examined, but only as witnesses to the formal search of one or two houses. The Inspector of Police, who seems to have enquired into the case, was examined before the Magistrate, but upon that point only; and, though he was put down as a witness before the Sessions Judge, the Sessions Judge, for some reason wholly unexplained, did not examine him at all. From a statement made by the Inspector before the Magistrate, it may be gathered that the District Superintendent of Police took part in the proceedings, but he is neither examined, nor does his name elsewhere appear. The Sessions Judge has also wholly omitted to test the credibility of the principal witnesses to the recognition on the point which I have suggested, by asking when, how, and to whom they first

denounced the prisoners. They are well examined as to what occurred at the actual dacoity, but as to their subsequent conduct there does not seem to be a word. I do not think that I can justly dispose of the case without evidence upon this point. The Sessions Judge is, therefore, directed to take evidence to show what was the conduct of these witnesses after the dacoity, whether they at once denounced the prisoners, what were the first reports made to the Police, and by whom and what dacoits were mentioned by name in those reports; how, when, and under what circumstances the prisoners were arrested; what clues led to the search of houses and other proceedings, and generally what was done in the case from the 18th July till it was sent in to the Magistrate. He will summon the Police Officers concerned, including the District Superintendent, require them to produce their books and papers and every thing which may throw light on these facts, and he will take any other evidence likely to clear them up. After which he will submit the papers with his own opinion whether it appears that the witnesses have really, from the very time of the occurrence of the dacoity, consistently stated that they recognized the prisoners.

The 12th March 1866.

Present :

The Hon'ble F. A. Glover, *Judge*.

Appeal—Plea of guilty.

Queen versus Kurmoon Koormee and others.

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of false evidence.

Where a Sessions Judge and Assessors find a prisoner guilty on his own plea, there is no ground of appeal.

ALL the prisoners pleaded guilty before the Sessions Judge, and did not claim to be tried.

The Sessions Judge and Assessors found them guilty on their own pleas, and there is manifestly no ground for appeal now.

With reference to the concluding paragraph of the Sessions Judge's remarks, I think that this case should be laid before the Judge in the English Department for such orders as may be deemed necessary.

The 13th March 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell,
Judges.

**European British subject (Plea of being)—
Evidence.**

*Referred under Section 434, Act XXV. of
1861, and Circular Order dated 15th July
1863.*

Mr. Clark *versus* W. Beane.

A Deputy Magistrate ought to give an opportunity to a prisoner to plead that he is a European British subject.

The mere statement of a prisoner that he is a European British subject, made before the Deputy Magistrate after the trial had been completed, cannot be acted on.

It appears to us on an inspection of the proceedings in this case that the Deputy Magistrate did not give the prisoner an opportunity of pleading that he was a European British subject. Had he put the questions which would have enabled him to fill up the printed form of examination, the prisoner would have had that opportunity.

We think, therefore, that the proceedings on the trial were irregular, that the conviction must be quashed, and the case remanded to the Deputy Magistrate.

We refer the Deputy Magistrate to Beaufort's Criminal Law, Section 4591, as to his duties when a person whom he has reason to suppose is a British subject is brought before him.

Norman, J. I may add that we cannot act on the mere statement of the prisoner made before the Deputy Magistrate, on the 29th of February, after the trial had been completed, and the Deputy Magistrate's function and jurisdiction had ceased. There is, therefore, in fact, no evidence before us whether the prisoner is a European British subject or not.

The 21st March 1866.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Jurisdiction (of Deputy Magistrate)—Previous Conviction.

In re Sheikh Booluck.

The jurisdiction of a Deputy Magistrate competent to try the offence charged is not affected by the previous conviction of the prisoner.

OWING to the neglect on the part of the Sessions Judge to comply with the orders

issued by this Court in Circular No. 18, dated 15th July 1863, the Court have had considerable difficulty in dealing with this case. The Judge has failed to give a brief analysis of the case, or to explain the terms of his order which he seeks to have reversed, or the grounds upon which his application is made. To avoid the delay which a reference to the Judge would entail, the valuable time of the Court has been spent in collecting from the record of the case those points which it was the duty of the Judge to have stated clearly and concisely. The facts of the case appear, as far as the Court can make them out, to be the following :—

Sheikh Booluck was, on 24th November last, convicted under Section 454 of the Penal Code, by Baboo Kooldep Narain Sing, a Deputy Magistrate, whom the returns in the Office of the High Court show to be exercising the powers of a Magistrate, and the prisoner was sentenced to rigorous imprisonment for one year. On his appeal, the Sessions Judge on the 20th December reversed that conviction and sentence, and ordered a re-trial of the appellant on a charge under Section 457 of the Penal Code. It is by no means clear on what grounds the Judge thought himself bound to pass such an order; but from the terms of his judgment and of his letter referring the case, it would seem as if the Judge held that the Deputy Magistrate had acted without jurisdiction in convicting a person charged before him with an offence cognizable only by a Court of Session. An offence falling under Section 457 of the Penal Code is, by Act XXXIII. of 1861, Section 2, made triable by a Court of Session or Magistrate of the District or Subordinate Magistrate of the 1st Class, which is a jurisdiction similar to that prescribed by the Schedule to the Code of Criminal Procedure for offences falling under Section 454. Under whichever of these Sections the trial was held, the Deputy Magistrate acted clearly with jurisdiction, and it was not material, as regards the question of jurisdiction, whether or not the appellant convict had been previously convicted. This fact might no doubt influence the Court sentencing him; it might possibly lead a Magistrate to commit him to the Sessions Court for trial, instead of convicting him himself; but it would not necessarily place the trial beyond jurisdiction of a Court competent to try the offence charged as in the case now before the High Court.

Under these circumstances, the Court hold that the orders of the Sessions Judge in reversing the sentence passed by the Deputy

Vol. V. Magistrate, and directing a new trial to be held, are without jurisdiction and illegal. The Court accordingly order that the order of the Sessions Judge be reversed, and that the sentence passed by the Magistrate be restored, and that it do have effect from the 24th November 1865, the date on which it was passed.

The Court in conclusion are compelled to record their dissatisfaction with the conduct of the Sessions Judge in this case, as well as with his disregard of so well-known a circular as that issued by them on the 15th July 1863.

The 23rd March 1866.

Present :

The Hon'ble J. P. Norman and L. S. Jackson, *Judges.*

Evidence of witnesses at the Sessions (to be compared with their depositions before Magistrate).

Queen versus Bindabun Bowree and others.

Committed by the Assistant Magistrate of Raneeungee, and tried by the Sessions Judge of West Burdwan, on a charge of Dacoity.

A Judge should compare the statements of the witnesses recorded by the Magistrate at the preliminary investigation, with the evidence of the same witnesses at the Sessions.

THE prisoners have been convicted of dacoity, and sentenced by the Judge of West Burdwan to transportation for seven years.

They appeal. Ramtonoo Potedar deposed that, on the last day of Assin, he was sleeping in a small hut with his young son Kaleepershad, aged about 7 years. About 12 P.M. he heard a noise in the thatch. He received a blow from a *lallee*, and then a second on his legs. He was rising up when another blow was struck across his chest; he seized the handle of a *karalli*, and struck one of the dacoits twice with it. There were about eight or nine dacoits. He says he recognized all the prisoners. He fell down. The dacoits struck him with stones on the head, and he became insensible. When he recovered, he

found himself in the hospital, where he remained for some time.

Rookhinee, the wife of Ramtonoo, said, she was dragged from her bed by four men, and saw eight or ten thieves. She recognized the four prisoners. She snatched a *kulsee* from one of the robbers, when the prisoner Haradhan came through the *palin* leaf hedge, and took away the *kulsee* from her, escaping by the door. There was blood on the leaves of the hedge.

Kaleepershad, the prosecutor's son, recognized the four prisoners as having been present, and, in fact, on the Police coming up, after an alarm had been given, he said he could show where the prisoners lived, and took the Police to the prisoners' houses which were close by.

Haradhun, when arrested, had a fresh scratch on his leg, and the mark of a blow from a stick on his back. Gunganarain and Bindabun, the chowkeeders of the village, were not to be found when the alarm was given. Bostum is a person who lives in the house of Bindabun.

The Judge and Assessors were unanimous in believing the evidence of the witnesses who swore that they recognized the prisoners amongst the dacoits. There was no real defence set up in answer to the charge. The action of the prosecutor's little son, in taking the Police to the houses of the prisoners, was apparently natural and inconsistent with any notion that the charge was not made honestly. The marks on the body of Haradhun were such as might have been naturally expected to be found on some one of the robbers.

Under these circumstances, we cannot interfere with the finding of the Judge and Assessors who heard the witnesses, and could judge better than we can whether they were persons whose testimonies could safely be trusted.

We may observe, however, that if during the trial the Judge had placed on his desk before him the depositions taken at the preliminary investigation, and compared the statements of the witnesses recorded by the Magistrate, paragraph by paragraph, with the evidence as given by the same witnesses at the Sessions, he would have been in a position to put questions on cross-examination, the answers to which might have cleared up some discrepancies, or possibly elicited facts favorable to the prisoners.

We dismiss the appeal.

*Campbell, J.**—In this case I am compelled to differ from my honorable colleagues. It seems to me that, if the Judge has not done his duty, has not cross-examined the witnesses so that the replies, as observed by my colleagues, "might have cleared up some discrepancies, or possibly elicited facts favorable to the prisoners," the omission is not to go against the prisoners, but rather they should have the benefit of any doubt left in consequence. It appears to me that the examination of the witnesses was extremely superficial and unsatisfactory. Much important evidence (especially that of the police and of the neighbours who were first alarmed) is altogether wanting, and what there is goes to my mind rather to induce the belief that the evidence to recognition is wholly unreliable. There were certain suspicious circumstances against three of the prisoners; and the question, I think, is, did these circumstances suggest a subsequent assertion of recognition, or did the witnesses really recognize the prisoners (neighbours perfectly well-known to them) in the first instance? It is clear that many of the neighbours were alarmed and brought together at the time of the dacoity. Did the witnesses who now say that they recognized the dacoits then say so? I think not. The first witness and prosecutor Ramtonoo says he was knocked over, and became senseless: "how could I tell the villagers?" Before the Magistrate he swore, "*I did not see Gunga.*" Before the Judge he says he *did* see and recognize Gunga, and no question is put to him regarding the discrepancy. I do not think him worthy of credit.

Besides the three eye-witnesses there is only one other witness for the prosecution, the head man of the village, who came to the spot when the alarm was given, and he is a very good witness, so far as he goes. He was not properly questioned, but his evidence leads directly to the conclusion that no dacoit was mentioned till after the regular police came. Gunga was sent for to take the news to the thanmah, and on account of his absence another chowkeedar was sent, a statement quite inconsistent with the supposition that Gunga was then known to be one of the dacoits. He goes on without any mention of recognition till the police came, and then tells us, in so many words, that the second (female) witness up to that time said

that she could not name any one. We are thus reduced (at this early stage of the case) to the little boy who, up to that time, seems to have said nothing, but who was then in the hands of the police, induced to point out the houses of the prisoners. I should add that it was distinctly stated by the witnesses before the Magistrate that the prisoners had their faces concealed with cloths. The Judge does not put a question on this subject, nor in any way elicit how or by what marks the prisoners were recognized. My belief is that, till the police came on the scene, there was no recognition whatever; that, owing to the absence of the two chowkeedars (Bindabun and Gunga) and the circumstance of a scratch being found on the leg of one of the neighbours Haradhan, some sort of suspicion fell on them; that the boy pointed out their houses, and then the witnesses, amplifying their private belief of their guilt, swore to having recognized them. At any rate, in the imperfect state of the evidence, the case is, I think, fully open to this doubt.

There is very strong evidence that the remaining prisoner Bostum had, when in prosecutor's master's service, detected the prosecutor purloining a hinge, and caused him to be turned out. I think it most unsafe, under such circumstances, to condemn Bostum on such evidence to recognition, without, in his case, a title of corroboration.

The 24th March 1866.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Acquittal of prisoner—Disposal of property.

In re Haree Bundhoo Santra of Cuttack.

Petitioner.

Where a prisoner is acquitted of the offence charged, the Court ought not to order the property in respect of which the offence was charged to be given to the prosecutor.

It appears to us that, as the prisoners were acquitted of the commission of the offence with which they were charged, the

Cr., 41.

* *N. B.*—This case was heard on appeal by Mr. Justice Campbell also, whose name was inadvertently omitted in the heading of the case at page 54.

Vol. V. Court ought not to have ordered the property to be given up to the prosecutor, or to have made any order transferring the property from those who had possession of it. The case altogether is one which can be dealt with far better by a Civil than by a Criminal Court. We reverse the order complained of, and direct that the property be given to those who were in possession of it when the criminal proceedings were instituted.

The 24th March 1866.

Present :

The Hon'ble A. G. Macpherson, *Judge*.

Criminal Misappropriation.

Miscellaneous Case.

In re Sreekant Biswas.

The mere fact that the prosecutor gave the prisoner time to make out his accounts and pay the balance due does not vitiate a conviction for dishonest misappropriation, or shew that the matter is one for the Civil Courts only.

I DISMISS this appeal. I think there is sufficient evidence of dishonesty to justify the Court's finding that the misappropriation was dishonest. And I think that the prosecutor in no degree by his conduct showed that the matter was merely an ordinary one of breach of contract, so as to exclude this case from the cognizance of the Criminal Courts. The prosecutor merely gave the prisoner time to make out his accounts and to pay what was due, but he took no security of any kind from him. The prisoner subsequently, without having made good any part of the admitted deficit, absconded, whereupon the criminal prosecution was commenced. The indulgence granted to the prisoner cannot vitiate his conviction.

No error in law is shown in the proceedings of the Lower Court, and the appeal is accordingly dismissed.

The 24th March 1866.

Present :

The Hon'ble L. S. Jackson and F. A. Glover, *Judges*.

Jurisdiction—Power of Sessions Judge on appeal to reverse Deputy Magistrate's conviction where no criminal offence committed.

Miscellaneous Case.

In re Panchanun Biswas and others.

A Sessions Judge is quite competent on appeal to reverse a conviction by a Deputy Magistrate, if he thinks that the evidence is insufficient to establish a criminal offence against the prisoner.

We think that the Sessions Judge would have been quite justified, under the circumstances of the case, in reversing on appeal the Deputy Magistrate's order if he thought that the evidence was insufficient to establish a criminal offence against the prisoners, and it was obviously immaterial whether the crime, as charged by the Deputy Magistrate, was correct or not in point of degree, so long as the Sessions Judge was of opinion that no criminal offence at all had been committed. If he had considered the evidence, which in the Deputy Magistrate's opinion established the charge of theft, to have established the higher crime of dacoity, it would have been a question whether the prisoners ought not to have been committed to take their trial on the graver charge before the Court of Session, by which alone that offence is cognizable. But, as from his letter he seems clearly to have been of opinion that neither theft nor dacoity had been committed, he should, we think, have disposed of the appeal in the usual way, and have ordered the release of the prisoners.

The 24th March 1866.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges*.

Jurisdiction—Disputes concerning right of use of land or water—Evidence (Police Report).

Sreemunto Duloui

versus

Ramchand Aduck.

The following case was referred to the High Court by the Sessions Judge of Hooghly under Section 434, Act XXV. of 1861, and Circular Order dated 5th July 1863. No. 18.

A Deputy Magistrate has no jurisdiction, under Section 320 of the Code of Criminal Procedure, to order a ditch, which was once a pathway, but afterwards filled up, to be opened out, and a wall built upon it, before any complaint was made regarding the filling up of the ditch, to be pulled down. Even if he had such jurisdiction, he should not pass such an order without legal proof that the use of the ditch and pathway was open to the public or to the prosecutor.

Case.—On the 4th January last, one Ramchand complained before the Magistrate of Howrah that Sreemunto Duloui had obstructed him by shutting up a water-way, and requested the trial of the case under Section 339 of the Penal Code.

On the 16th idem it was transferred to the Deputy Magistrate, Mr. Ricketts, and the prosecutor then deposed that, about one month previously, the accused had filled up the whole of a ditch and commenced building a wall thereon, and that this ditch was the boundary between his property and that of accused. The accused deposed that he had filled up no ditch, and that he had commenced to build a wall on his own land. The Deputy Magistrate ordered a local enquiry by the Police. The Police Inspector reported that Ram Keenoo Santara stated that his father had rented to the accused the land on which this ditch had been for 50 years, and that last year the accused filled up one end of it, and during January had quite filled up the ditch, and built a wall of 4 feet high upon it, and that the ditch formed a small pathway, which the Inspector seemed to think was the origin of the dispute. The Deputy Magistrate took no further evidence in the case, and on the 20th January record-

ed that, having read the police-report and the police diary, and seen a map filed by the Police, "the ditch appearing to have been filled up, and a wall built upon it, I direct, under Section 320 of the Criminal Procedure Code, that the ditch be opened out as before within 15 days from the date of this order, until exclusive possession to defendant be given by a competent Court."

I consider the Deputy Magistrate's order to be illegal, because he does not say that the subject of dispute is open to the use of the public, or any person or class of persons, and because he took no evidence on this point. The police-report is no legal evidence in itself, and it does not assert the above, nor did the prosecutor's deposition assert it. If the Deputy Magistrate was of opinion that a presumption on this point arose, he should have called for evidence on the point, and should not have determined upon such a report alone. The report states that the land was rented to the accused, and that there was a ditch now filled up by defendant, and that the ditch formed a pathway; but that the ditch was open to the use of the public, or that the pathway was used by any person other than the accused, it does not state.

I also think the order was illegal, because I think Section 320 does not refer to *state* cases, and that if, after a wall has been built, a party makes a complaint regarding the land on which it is built, the Deputy Magistrate has then no power under that Section to order the ditch to be opened out (and thereby the wall pulled down). If he has such power under that Section, then a man may wait until not merely a small wall, but a large pukka house, be built, and then apply to the Deputy Magistrate, who could order the said house to be pulled down. I think Section 320 cannot apply to such cases.

I think the Deputy Magistrate's explanation of the 10th ultimo is not satisfactory. He says that the ditch, including the pathway, is shewn by the police report to have been open for half a century to the use of the public. But *first* the report is not evidence; *secondly*, it does not mention the public; and, *thirdly*, it speaks of the ditch having been there 50 years, but does not state that the pathway had been there 50 years. He further says that the accused, by filling up the ditch, excluded the utility of the ditch from the public and the prosecutor; but it has not been proved that the ditch or pathway was open to the use of the public or of the prosecutor.

Vol. V. I therefore think the Deputy Magistrate's order should be cancelled altogether, on the ground of his having no jurisdiction to order, under Section 320, a wall, once built before the dispute was brought to the notice of the Deputy Magistrate, to be pulled down (which is the effect of his order), and that, if he had such jurisdiction, then his order should be stayed, until it was legally proved that the use of the ditch and pathway was open to the public or to the prosecutor.

Judgment of the High Court.—We concur with the Sessions Judge, and, holding the order of the Deputy Magistrate to be altogether illegal, we do hereby set it aside altogether.

The 24th March 1866.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges*.

Discharge by Magistrate—Commitment by Judge.

Miscellaneous Case.

Shoodun Mundle, *Appellant*.

A discharge by the Magistrate under Section 250 of the Code of Criminal Procedure is not final like an acquittal under Section 255, and the Sessions Judge under Section 435 may order the accused to be put upon his trial notwithstanding his discharge by the Magistrate.

It seems to us that the Sessions Judge, proceeding under Section 435 of the Criminal Procedure Code, can still have these persons put upon their trial for dacoity. The discharge of the accused persons by the Deputy Magistrate is expressly under Section 250, and, so far as we can find, no regular charge was ever drawn up, and the acquittal is consequently not final, or such as it would have been, had it been under Section 255. The Sessions Judge must use his own discretion as to the further steps to be taken. We may remark here that the Deputy Magistrate acted, as it appears to us, not without reason in the course he adopted.

The 26th March 1866.

Present :

The Hon'ble W. S. Seton-Karr, *Judge*.

Murder—Intoxication.

Queen versus Akulputtee Gossain.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Gya, on a charge of murder.

Intoxication is no excuse for a man throttling to death another and a weaker man who was intoxicated also. The Assessors having brought the case within Exception 4 of Section 300 of the Penal Code without any good evidence or substantial grounds, the Sessions Judge was held to have correctly overruled their verdict, and found the prisoner guilty of murder.

THE Sessions Judge appears to me to have correctly overruled the verdict of the Assessors, and to have rightly found the prisoner guilty of murder.

The Assessors do not appear to me to base their opinion that the case comes within Exception 4 of Section 300 of the Penal Code on any good evidence or substantial grounds.

The prisoner, it is proved, had an intrigue with the wife of the man whom he killed. He was the more powerful man of the two, and his intoxication could be no excuse for his literally throttling a man to death, that man being intoxicated also.

I see no grounds for altering the conviction, which is legal; and, this being so, there can be no question of mitigating the punishment.

Appeal rejected.

The 27th March 1866.

Present :

The Hon'ble W. S. Seton-Karr and L. S. Jackson, *Judges*.

Obstruction of Drain.

Miscellaneous Case.

In re Troylukhonath Bose.

The obstruction of a drain into which the sewage of complainant's premises fell does not fall either under Section 308 or 320 of the Code of Criminal Procedure, but is matter for a civil suit and injunction.

THIS case, which has already been several times before the Court, has to-day been considered again for the purpose of a decision, whether the order at first made by the Joint Magistrate, under Section 308 of the Code of Criminal Procedure, should not be set aside.

Mr. Twidale, in support of the order, admitting that he cannot support it as made, contends that it is a good order under the 320th Section of the Code.

It may be that, if the last-named Section was really applicable to the case, we might be justified in affirming the order, though purporting to be made under a very different provision of the law, though we do not by any means lay it down that we could do so, as the form of the enquiry and the matter to be decided are very different under the two Sections.

But we are of opinion that Section 320 is even less applicable to the case than Section 308, and that an obstruction of the drain, into which the sewage of complainant's premises fell, does not come within the terms of the Section relating to disputes concerning the use of land or water.

We are, therefore, obliged to reverse the order of the Joint Magistrate. The parties must be referred to a civil suit and injunction.

The 4th April 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell,
Judges.

Evidence (of accomplices and accessaries after the fact)—Corroboration—View by Assessors.

Criminal referred Jurisdiction.

Queen versus Chutterdharee Sing and others.

Committed by the Magistrate, and tried by the Sessions Judge of Bhaugulpore. on a charge of murder.

Case of murder where those prisoners whose conviction depended on the uncorroborated evidence of accomplices, and an accessory after the fact, were acquitted.

In cases of view by Assessors of the scene of the alleged offence, it was held that the Judge could not delegate his own function of examining witnesses on the spot to the Assessors, who cannot, under Section 348 of the Code of Criminal Procedure, speak to or communicate with any other person than the officer appointed to conduct them to the place.

Norman, J.—THE case rests mainly on the evidence of accomplices. It is no doubt true that, as mere matter of law, it is competent for a Jury to convict on the uncorroborated testimony of an accomplice even in

capital cases. (*See Best on Evidence, page 182; Chitty's Criminal Law, page 605.*) But the danger of relying on such evidence is so great that in England Judges always advise juries not to convict, or tell them they ought not to convict, unless the story of the accomplice be corroborated.

In Gilbert on Evidence, cited in Archbold's Criminal Pleading, page 226, accessaries are placed in the same category as accomplices. But it is evident that they stand on a very different footing. Their guilt may be infinitely less, and they have not the same interest in making a charge against others to save themselves. It is not every participation in a crime which will make a party an accomplice in it so as to require his testimony to be confirmed. (*Best on Evidence, page 223, citing Rex versus Hargraves, V. Edition, p. 170, Rex versus Jarvis, H. M. and Q. 40.*) It is not, however, necessary to say whether we should have treated the evidence of Edoo, who appears to be at most an accomplice after the fact, in all respects as that of an ordinary witness, and not on the same footing as that of an accomplice if the charge had been made recently after the event. But his silence for upwards of four years prevents us from feeling perfectly safe on accepting his testimony unconditionally. In consequence of the late period at which the charge is brought forward, if any member of the gang not concerned in this particular offence, or indeed if any other innocent person were either maliciously or mistakenly included amongst the parties alleged to have been present and engaged in the crime, it would, in the nature of things, be now almost impossible for such person to adduce evidence to rebut the charge.

We think, therefore, that we ought not to convict any of the prisoners except upon evidence of the strongest and most absolutely reliable character; and therefore on that ground, remembering too that the lives of the prisoners are at stake, and that any error on our part would be irremediable, we think it safer in this particular case not to convict on the evidence of the accomplices and the accessory, unless in those instances in which their evidence is corroborated. Such corroboration exists in the case of Chutterdharee Singh and Gopaul Singh. The prisoner Bhanee made a confession before the Magistrate. We are satisfied with the evidence, and agree with the Judge and Assessors that these prisoners are guilty. We think that the sentence of death is a proper one as regards

Vol. V. the two first prisoners, and that of transportation for life as regards the prisoner Bhanee. The other prisoners will be acquitted.

We think it right to notice a serious irregularity in the trial. The Assessors desired to view the scene of the alleged offence. The Judge ordered that certain of the witnesses should attend with the Assessors, and he says that he impressed upon the Assessors the necessity of orally examining the witnesses, if they desired to do so, in the presence of the accused, who would be present in the vicinity of the temple.

It is clear that no such proceeding is warranted by Section 348. In case of a view it is the duty of the officer conducting the Jury or Assessors to the spot, *not to suffer any other persons to speak to or hold any communication with any of the Jury or Assessors*, who, when the view is finished, are to be immediately conducted back to the Court.

In the present case the Judge appears to have committed the grave error of supposing that he could delegate his own high function to the Assessors.

Campbell, J. In this case I entirely concur with my learned colleague in the view which he has taken. I would only except the quotations of English authorities in regard to the evidence treated as matter of law, the law of England having in my opinion no authority whatever in the branch of this Court in which we are sitting. But, dealing with the evidence as matter of fact, I am sure that nothing can be more applicable to the case than the remarks on the evidence of accomplices contained in the charges to juries by Judges whom we all so eminently respect as Lord Abinger and Baron Alderson, and which are usually quoted on the subject. It was pointed out in very clear language that not only is the evidence of accomplices without confirmation most unsafe, but also, even when the general credibility of the story is confirmed by overwhelming evidence, it is very unsafe to convict without some corroborative evidence *connecting the particular person accused with the transaction*; because the general story may be perfectly true—the accomplice may really have taken part in the crime as he describes—his times, places, and circumstances may be exact; and yet he may at his pleasure put in one man as an actor instead of another. These cautions are especially applicable to this country. I have seen a great deal of the working of Detective Departments, and I well know that, while well

worked they have led to great results, they are also very liable to abuse. An accepted approver regularly employed by the Department—a villain of the deepest dye according to his own showing—seems to the people to have life and death in his hands: those whom he denounces are carried before a dreaded inquisitorial tribunal; those whom he spares are spared. It is necessary, then, to watch the evidence of such men with very great care; and I am glad to see that these Bhaugulpore cases are not usually sent up without strong corroborative evidence. There may be cases in which the evidence of different accomplices is given under such circumstances and with such real security against any possible intercommunication, that they do, to the most careful mind, in a great degree, corroborate one another. But in this case that is hardly so. The accomplices might have conspired together, and Edoo seems, according to his statement, to have been so much (under the law existing at the time before the operation of the Penal Code) an accomplice after the fact, and to have so long concealed a horrible murder, that we cannot safely treat him as a witness altogether reliable in regard to the actual presence of each of the persons denounced by the approvers. I therefore agree in thinking that the prisoners against whom no other evidence than that of Phool Chund, Budhoo, and Edoo, is to be found, should be acquitted and released.

As respects Gopaul and Chutterdharee, there is strong corroborative evidence, if it is to be believed. The evidence formerly given by those witnesses who were examined as witnesses on the former trial is not inconsistent with their present evidence, though they were then silent on the facts now stated as affecting the present prisoners. With respect, in particular, to the most important witness, Jowahir Tehsildar, it is clear that his former evidence was confined to the very narrowest points affecting other parties then accused, and that he gave no general narrative which might have brought out the visit of Gopaul and Chutterdharee to the Priest. The defence of these prisoners, then, can only be founded on the supposition not only that the approvers have got up a case, but that apparently independent witnesses, with nothing to gain by such a course, have joined the officers of the Detective Department in a vile conspiracy to hang two innocent men. There is no ground for such a belief that I can see. I concur in the sentence of death on Chutterdharee and Gopaul.

Benee's own confession is corroborative evidence against him. The Judge has already sentenced him to transportation for life, and we can hardly do otherwise than confirm that sentence.

The remaining prisoners are released.

The 15th February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, Chief Justice, and the Hon'ble C. B. Trevor, W. S. Seton-Karr, L. S. Jackson, and A. G. Macpherson, *Judges*.

Review of Judgment (in Criminal cases).

Queen versus Godai Raout.

Petition praying for a review of judgment.

Mr. J. Cochrane for Petitioner.

The High Court cannot entertain an application to review a judgment passed by it on appeal in a criminal case.

Semble. No subordinate Criminal Court has the power to review its own judgment.

This case was referred to a Full Bench by Justices Seton-Karr and Macpherson with the following order:—

Referring Order.—THE prisoner in this case was tried by a Jury, convicted, and sentenced. He appealed to this Court, was heard by his Counsel, and on the 16th ultimo we dismissed this appeal, confirming the conviction and sentence.

Mr. Cochrane, for the prisoner, now applies to us to review the judgment which we passed on the ground that it is wrong in law.

Without entering at all into the merits of that judgment, it appears to us that the application ought to be rejected on the simple ground that this Court, having given judgment in a criminal case regularly brought before it on appeal, has no power to review its judgment. Section 38 of the Charter provides that the proceedings in criminal cases shall be regulated by the Code of Criminal Procedure, "being Act XXV. of 1861, or by such further or other enactments in relation to Criminal Procedure as are now in force" or as may be made by the Governor-General in Council in relation to such proceedings. Now, Act XXV. of 1861 gives no power to review a judgment passed on appeal in a criminal case, nor does any other enactment now in force, so far as we are aware, give any such power. A review of judgment in civil cases is given

by the express provisions of the Civil Procedure Code; but, in the absence of any such provisions as regards criminal cases, in our opinion, there is no review.

We find, however, that, in the case of the *Queen v. Pursoram Doss* (reported 3 Weekly Reporter, page 45, Criminal Rulings), a review was admitted, apparently without question or argument, by Kemp and Glover, Judges. As our opinion conflicts with that which those learned Judges must have entertained, and as the point is one of importance, we refer the question for the decision of a Full Bench. The only question referred is the general one whether the Court has any power to entertain an application to review its judgment passed in a criminal case before it on appeal.

Judgment of Full Bench.—The Court is clearly of opinion that a review of judgment will not lie from a sentence or judgment pronounced by the High Court, or by a Division Bench of the High Court in a criminal case upon appeal. By Section 38 of the Charter of the High Court it is ordained "that the proceedings in all criminal cases which shall be brought before the said High Court of Judicature in Bengal, in the exercise of its ordinary original criminal jurisdiction, and also in all other criminal cases over which the said Supreme Court now has jurisdiction, shall be regulated by the procedure and practice now in use in the said Supreme Court, and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure prescribed by an Act passed by the Governor-General in Council, and being Act No. XXV. of 1861, or by such further or other enactments of the Governor-General in relation to Criminal Procedure as are now in force."

Regulation IX. of 1793, Section 73, has been relied upon in support of the argument in favor of a review of judgment. By that Section it was enacted that the Nizamut Adawlut should exercise all the powers which were vested in it whilst it was stationed at Moorsshedabad, and superintended by the late Naib Nazim Nawab Mahomed Keza Khan.

It appears to the Court that the proceedings in criminal cases in the High Court are not regulated by the provisions of Section 73, Regulation IX. of 1793, even if that Section has not been virtually repealed by the Code of Criminal Procedure. When the Letters Patent declared that the proceedings in all criminal cases shall be regulated by

Vol. V. Act XXV. of 1861, it clearly could not have been intended to vest the High Court with the powers of the Nizamut Adawlut whilst it was stationed at Moorshedabad, and superintended by the Nawab Nazim. It is not shewn, and it is not likely, that the Nawab Nazim ever granted reviews of judgment. This is an answer to that portion of the argument of the learned Counsel which depends upon Section 73, Regulation IX. of 1793.

The next argument to be considered is that which depends upon Regulation XIV. of 1810. In the course of his able argument, the learned Counsel, Mr. Cochrane, referred to Sections 3 and 4 of that Regulation. But it appears to us that those Sections had a very different object from that of conferring a mere power to review a judgment upon the ground of error as regards either the facts or the law. As we understand Regulation XIV. of 1810, it merely allowed the Court to grant a remission or mitigation of punishment whenever they should be of opinion that a prisoner according to the *futwa* of the Mahomedan Law Officers, or according to the Regulations, was declared liable to a more severe punishment than the case warranted. Section 3 says: "In all criminal trials before the Court of Nizamut Adawlut (except for crimes against the State, in which cases the proceedings held upon the trial are required by Section 5, Regulation IV. of 1799, and Section 5, Regulation XX. of 1803, to be submitted, with the sentence of the Court, for the orders of Government), if the *futwa* of the Law Officers of the Nizamut Adawlut, or the sentence of an assembly of hill chiefs in Zillah Boglepore (held under the provisions of Regulation I. of 1796), shall declare a prisoner or prisoners liable to a more severe punishment than, on due consideration of the evidence and all the circumstances of the case, may appear to the Court of Nizamut Adawlut to be just; or if a prisoner or prisoners (not charged with a crime against the State) shall in any case before the Court of Nizamut Adawlut, under the provisions of the Laws and Regulations in force, be liable to a more severe punishment than may appear to the Court equitable, though not specifically declared by the *futwa* of the Law Officers, or sentence of the hill chiefs in Zillah Boglepore, it shall be competent to two or more Judges of the Court of Nizamut Adawlut to grant such remission or mitigation of punishment as may appear just and proper, according to

"the evidence and circumstances of the case, and to pass sentence accordingly; provided that in all such cases the Court of Nizamut Adawlut shall record the grounds upon which a remission or mitigation of punishment may be adjudged under the discretion hereby vested in that Court, and shall communicate the same to the Court of Circuit (or Magistrate of Zillah Boglepore) before whom the trial may have been held, with directions to cause the same to be made known in open Court to the prisoner or prisoners concerned."

That Regulation did not give the Lower Courts the power of reviewing their own judgments on the grounds therein mentioned. The power was conferred upon the Nizamut Adawlut alone. But if this Court has power to review a judgment under the Code of Criminal Procedure, the Lower Courts must have that power also. Section 4 of the Regulation did not carry the case farther than Section 3. It declares that the powers vested in the Nizamut Adawlut by the preceding Section shall be considered applicable to all cases in which that Court (meaning the Nizamut Adawlut) may revise a sentence passed by a Court of Circuit, or Zillah, or City Magistrate, or Assistant to a Magistrate, in pursuance of Section 24, Regulation IX. of 1807; or under any other provision in the Regulations. It is also declared applicable to any cases in which the Court of Nizamut Adawlut may see reason to revise a sentence passed by that Court, and to remit any part of the punishment adjudged. But this discretion shall not be exercised without strong and sufficient grounds, to be recorded at large upon the proceedings of the Court.

Now, the words "by that Court" have been very properly argued to mean the Nizamut Adawlut itself. But then the only power of that Court is that given by the 3rd Section, *viz.*, the power to grant a remission or mitigation of a sentence where the *futwa* of the Law Officers, or the general Laws and Regulations in force, declared a prisoner liable to a more severe punishment than upon a due consideration of the evidence and all the circumstances of the case might appear to the Court equitable or just. These Sections have been altogether repealed by the Repealing Act XVII. of 1862, and therefore no longer exist. But it has been argued by the learned Counsel that there has been one uninterrupted series of authorities for 52 years to shew that the Nizamut Adawlut

exercised the power of review under the general powers of the Court.

No doubt, when this Regulation existed, the Court had the power to revise sentences for the purpose of mitigating them. But a practice even for 52 years under a particular law does not show that a right existed independently of that law, or continues to exist after it has been repealed. The Sections above referred to did not confer a power upon the Criminal Courts of reviewing their own judgment upon the ground of their having come to an erroneous conclusion upon the evidence given before the Lower Court, or of their having committed a mistake on a point of law.

The Code of Criminal Procedure does not contain any Section expressly authorizing a review of judgment in a criminal case after the judgment has been recorded. The Code of Criminal Procedure was passed after the Code of Civil Procedure. The latter contains a Section expressly authorizing a review of judgment, but the former contains no corresponding Section. From this it may reasonably be inferred that the Legislature did not intend to confer in criminal cases a power similar to that which they had given in civil cases.

There were certainly one or two cases cited in which the Nizamut Adawlut did grant a review, not simply under the Regulation of 1810, but generally upon the merits of the case. The cases, however, were not so numerous as to shew that there was a uniform uninterrupted practice of granting reviews upon the general merits of the case. There are only three or four cases to which our attention has been called.

One of the Circular Orders of the Nizamut Adawlut was referred to by the learned Counsel. The one of 9th May 1861 has also been brought to our notice. The learned Counsel contends that the ruling in that Circular Order is not correct, inasmuch as it was opposed to the principles of Regulation XIV. of 1810. The Circular Orders are certainly not authorities binding on the Court; but they are useful for the purpose of showing what was the opinion of the Court as to whether there had been an uninterrupted practice or series of authorities on a particular subject. In the Circular Order of 9th May 1861, the Sudder Court (Messrs. Raikes, Trevor, Loch, and Steer) declared that the power vested in the Court by Section 4, Regulation XIV. of 1810, was "a power of revision, with a view of a remission of part of the punishment, and

did not extend to the granting a review of judgment or re-hearing a whole case, which might eventually end in a sentence opposed to that originally passed." The Circular Order goes on to say that "it is questionable whether the power exists under Regulation law, and should a case come to the notice of the Court in which the sentence originally passed appears erroneous, and the prisoner entitled to acquittal, the proper course, it seems to the Court, would be to report the case to Government, in order that a pardon might be granted to the prisoner."

It appears, therefore, that, as late as May 1861, there was a Circular Order of the Sudder Court stating that the power vested in the Court by virtue of Regulation XIV. of 1810 did not allow a review of judgment generally upon the merits, but merely for the purpose of remitting a portion of the punishment when it was considered too severe. Surely that is not (as it was contended in the averment) contrary to Regulation XIV. of 1810. It is clearly in accordance with the words of Sections 3 and 4 of that Regulation.

But a further question remains to be considered, *viz.*, whether, even supposing the Sudder Court did, before the passing of Act XXV. of 1861, allow a review, was the same power of granting reviews in criminal cases continued to the High Court by the Charter of which Section 38 (which has already been read) directs that its proceedings in criminal cases shall be regulated by Act XXV. of 1861.

Whether those cases were correct or not, is not material. Even supposing that they were correct, and that the Sudder Court had the power to grant reviews for the purpose of re-considering their judgments pronounced in appeal, it appears to us that that power no longer exists, for the High Court was required by Section 38 of its Charter to regulate its proceedings in criminal cases by Act XXV. of 1861.

Now, the next question is, does Act XXV. of 1861 contain any express or implied power to this Court to review its judgment in criminal cases? We have already pointed out that, notwithstanding there is an express Clause in the Code of Civil Procedure providing for cases in which reviews of judgment may be allowed, the Code of Criminal Procedure is wholly silent upon the point, and therefore, if the power is given by the Act, it is simply by inference from certain

Vol. V. Sections, and those are the Sections to which the learned Counsel has alluded.

First, he has referred to Section 404. That Section contains the following enactment :—

"The Sudder Court may, on the report of a Court of Session or of a Magistrate, or whenever it thinks fit, call for the record of any criminal trial, or the record of any judicial proceeding of a Criminal Court, other than a criminal trial, in any Court within its jurisdiction in which it shall appear to it that there has been error in the decision on a point of law, or that a point of law should be considered by the Sudder Court, and may determine any point of law arising out of the case, and thereupon pass such order as to the Sudder Court shall seem right."

That is, that in those cases where an appeal is not expressly given by law, the Sudder Court may, of its own authority, or on the report of a Court of Session or of a Magistrate, call for the record of any criminal case for the purpose of setting the Judge right upon any point of law. But that does not apply to setting a judgment right upon questions of fact; whereas, if the learned Counsel is right in his contention, the Court has the power of altering, upon review, not only a judgment of a subordinate Court, but also its own judgments upon a matter of fact as well as upon a matter of law.

Section 405 was also referred to. It says : "It shall be lawful for the Sudder Court to call for and examine the record of any case tried by any Court of Session for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed, and as to the regularity of the proceedings of such Court. If it appear to the Sudder Court that the sentence passed is too severe, the Sudder Court may pass any mitigated sentence warranted by law. If the Sudder Court shall be of opinion that the sentence or order is contrary to law, the Sudder Court shall reverse the sentence or order, and pass such judgment, sentence, or order as to the Court shall seem right, or, if it deem necessary, may order a new trial."

The Court has two jurisdictions: one as a Court of Revision to set right matters of law, even though there may be no appeal; and, *secondly*, as a Court of Appeal when an appeal is properly preferred before it.

Section 405 applies to the Court as a Court of Revision.

There is another Section (439) which deals with cases whether brought before the Court as a Court of Revision, or brought before the Court as a Court of Appeal. That Section enacts :—

"No trial held in any Criminal Court shall be set aside, and no judgment passed by any Criminal Court shall be reversed, either on appeal or otherwise, for any irregularity in the proceedings of the trial, unless such irregularity have occasioned a failure of justice."

It is contended that the words "or otherwise" shew that it is intended that the Court should have the power of reviewing its own judgment. But the Section is not an affirmative one giving jurisdiction, but a negative one directing that a judgment shall not be set right unless the grounds are such as shew that a failure of justice has been occasioned.

It appears to us, therefore, that none of the Sections which have been cited shew impliedly that it was the intention of the Legislature to give to the High Court a power of reviewing its own judgments after they have been duly recorded. We do not mean to say that if, before a judgment has been recorded, the attention of the Court be called to any matter shewing that there is an error or mistake in the judgment pronounced, the Court has not the power of correcting such error or mistake. Nor do we mean to say that the Court has not power to correct clerical errors in its judgments after they are recorded. But we are speaking of cases where the judgment has been recorded, and the Court is called upon to grant a review of its judgment for the purpose of shewing that it ought to have come to a different conclusion either upon the facts or upon the law.

The learned Counsel has pointed out that the consequences would be monstrous if this power of review were not given. But the same argument would apply to trials in the Courts in England. Suppose a jury should find a party guilty. There would be no appeal or writ of error, nor could the prisoner tender a bill of exceptions. The only mode of remedying the evil would be by appealing to the mercy of the Crown. So, in the present case, if it should be discovered that the Court has come to a wrong conclusion either upon a matter of fact or upon a matter of law, the case may be brought to the notice of the Executive Government, either for the purpose of mitigating the sentence or of pardoning the offender, as the case may require. There would be no end to cases of

this kind, if, after the Court has duly recorded its judgment, the matter is to be reopened on the ground that the Court has come to an erroneous conclusion.

In civil cases, if an erroneous judgment could not be set right upon review, there would be no one to appeal to for relief except the opposite party. But in criminal cases the Executive Government can always grant relief where an error has been committed.

It appears to us that it was the intention of the Legislature that the Court should not exercise the power of reviewing its own judgment in criminal cases. In civil cases, where such a power was intended to be given, it was conferred by express words in the Code of Civil Procedure.

We understand that, since the High Court has been in existence, there has been one case of a review by a Division Bench. But that case was never argued, and one of the Judges who granted the review (Mr. Justice Kemp), when he declared that he did not wish to prevent the case from being re-heard, expressly stated that he had doubts as to the power of granting a review. That, therefore, is no precedent; but, even if it were, it does not preclude the Court from considering the question in Full Bench.

The 4th April 1866.

Present :

The Hon'ble L. S. Jackson and F. A. Glover, *Judges*.

Grievous Hurt (Bone fractures)—Affirmation instead of Oaths (applicable only to Mahomedan and Hindoo witnesses).

Criminal Jurisdiction.

Referred under Section 434, Act XXV. of 1861, and Circular Order dated 15th July 1863.

Queen versus Ramtahal Sing and another.

Where bone fractures have been caused in addition to other injuries, the offence committed is grievous hurt triable by a Court of Session, and not hurt cognisable by a Magistrate.

A witness who is not a Mahomedan or Hindoo ought to be sworn, and not examined under the provisions of Act V. of 1840.

The conviction in this case, by the Deputy Magistrate, of the offence of "hurt," was clearly erroneous. He had before him the

evidence of the Civil Surgeon, from which it unmistakably appeared that two persons had sustained bone fractures (in addition to other injuries), and this, under the terms of Section 320 of the Indian Penal Code, constitutes grievous hurt.

There could be no doubt, therefore, that the prisoner might have been charged with "voluntarily causing grievous hurt," an offence punishable, under Section 325 of the Code, with imprisonment which may extend to 7 years, and triable by the Court of Session.

Magistrates are not at liberty to pass over material parts of the evidence in cases before them, and so to withdraw cases from the cognizance of the proper tribunals.

And, in this case, the accused person has received a sentence manifestly inadequate in respect of the violence with which he was charged.

The conviction is, therefore, set aside, and the Deputy Magistrate is directed to proceed according to law.

We observe that the Civil Surgeon appears to have been examined under the provisions of Act V. of 1840 (printed 1841). We presume that this officer is not a Mahomedan or a Hindoo, and he ought, therefore, to have been sworn.

The 7th April 1866.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges*.

Prisoner's witnesses—Conviction

Criminal Jurisdiction.

Referred under Section 434, Act XVI. of 1861.

Queen versus Kalee Thakoore.

Conviction quashed, the prisoner's witnesses not having been summoned.

The prisoner's witnesses ought to have been summoned, and it is impossible to say with certainty that the evidence could not have benefited the defence. The conviction is quashed. It may be doubted how far it is necessary or desirable, under the circumstances, to proceed further against the prisoner.

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The 9th April 1866.

*Present :*The Hon'ble L. S. Jackson, *Judge*.**Dacoity—Receiving property stolen in Dacoity.***Queen versus Motee Jolaha.**Committed by the Joint Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of dishonestly retaining stolen property with guilty knowledge.*

When a prisoner is apprehended eight days after a conviction, with part of the plunder in his possession, there is as good ground for charging him with the dacoity as with having received or retained with guilty knowledge, and he ought to be charged in the alternative form.

I HAVE read the evidence in this case, and do not think it necessary to interfere.

The cloth was fully identified, and the prisoner's defence was wholly unsupported. He speaks of two of his witnesses not having been summoned, but it does not clearly appear who they are. I observe that all those whom he examined before the Magistrate denied any knowledge of his pleas.

It is to be observed that the prisoner having been apprehended eight days after the dacoity with part of the plunder in his possession, there was as good ground for charging him with the dacoity as with having received or retained with guilty knowledge, and he might probably have been convicted in the alternative form.

The 9th April 1866.

*Present :*The Hon'ble L. S. Jackson, *Judge*.**Removal of wall—Nuisance—Right of use of land.***Miscellaneous Case.*Ram Lal Mookerjee, *Petitioner*.

When an application has been made to the Magistrate for the removal of a wall under Sections 308 and 310, Code of Criminal Procedure, as affecting the public convenience, the High Court will not compel the Magistrate to proceed under Section 310 upon a different ground, namely, to enquire whether the land on which the wall was built was open to the use of the complainant's people.

I AM of opinion that this Court ought not to interfere with the orders passed by the Joint Magistrate and the Court of Session.

The complaint (irregularly preferred by a general agent on behalf of Baboo Puddo-lochun Mundul) alleged an offence under several Sections of the Penal Code, and also prayed the Magistrate to deal with the case as affecting the public convenience under Sections 308 and 320 of the Code of Criminal Procedure. The Joint Magistrate declined to interfere, and recorded his opinion that the party accused was only protecting himself against a gratuitous annoyance on the part of complainant.

This Court is now asked to compel the Magistrate to proceed under Section 320, and enquire whether the land on which the wall was built was open to the use of the *complainant's people*; but the complaint was that the public were affected, and as the Magistrate, deciding that the public would not suffer, saw no reason to proceed, this Court will not interfere.

The 14th April 1866.

*Present :*The Hon'ble W. S. Seton-Karr and
F. A. Glover, *Judges*.**Previous convictions—Section 75, Penal Code.***Queen versus Pubon.**Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of theft in a building of cattle.*

An offender is only liable to enhanced punishment under Section 75 of the Penal Code for an offence punishable under Chapter XVII., after having been punished with imprisonment for the same offence, or for an offence punishable under the same chapter.

THE evidence clearly substantiates the theft of the two cows (in two cases) by the prisoner. It is proved that the animals were found tied up in his court-yard; that he had previously brought them to his house; and that, on being asked by his fellow-villagers as to how he had got them, he made up a false story of purchase. The prisoner makes no defence (beyond a general denial of his guilt), and calls no witnesses.

The only question that arises is the amount of punishment to be inflicted. The Sessions Judge has sentenced the prisoner to transportation for life under Section 75 of the Indian Penal Code, as the prisoner has been already several times convicted of offences coming under Chapter XVII. of this Code punishable with terms of imprisonment of three years and upwards.

It appears, however, from the record that three of these previous convictions—cattle-stealing (2) and burglary—took place before the Penal Code came into operation, and cannot therefore be taken into account in awarding the punishment in this trial. The other two cases were tried in December 1865, a few weeks only before the present one; and we are of opinion that Section 75 does not apply to such convictions. The meaning of the law appears to us to be that, when an offender, after having been punished with imprisonment for a crime under Chapter XVII., again, *after his release from prison*, commits a similar description of crime or a crime punishable under the same chapter, he is liable under Section 75 to enhanced punishment, on the ground that the sentence already borne has had no effect in preventing a repetition of his crime, and has been, therefore, insufficient as a warning. But where the prisoner's conviction has taken place a very short time before, and where no imprisonment under it has yet been undergone, and no time has been given for reformation, it cannot be said that a prisoner has had any opportunity of shewing what the effect of the first sentence would have been upon him, and it would not be just to punish him as though he were an incorrigible offender whom no comparatively light punishment could wean from evil courses.

Taking this view of the scope and meaning of Section 75, we quash the sentence of transportation for life passed by the Sessions Judge, and pass the sentence provided by

law for the offences of which the prisoner has been convicted, *viz.*, 7 years' rigorous imprisonment, and, with reference to the other cases, direct the Sessions Judge to pass such separate sentences as he may consider each offence proved at the late Sessions against the prisoner to deserve.

The 16th April 1866.

Present:

The Hon'ble F. A. Glover, *Judge*.

Records of previous convictions (when to be put in).

Queen versus Jehan Mullick.

Committed by the Deputy Magistrate of Pooree, and tried by the Sessions Judge of Cuttack, on a charge of house-breaking by night with intent to commit theft.

Records of previous convictions should not be put in until the prisoner has been convicted in the case then under trial.

This appears to be a perfectly clear case. The prisoner confessed before the Magistrate that he had stolen a quantity of the prosecutor's grain, and was caught in the act of taking it away. Before the Sessions Judge he denied his former admission, and attributed the charge against him to the influence of the prosecutor.

It is proved by evidence, which is not rebutted (for the prisoner calls no witnesses), that Jehan Mullick was arrested within the enclosure of the prosecutor's house, having by him one basket of grain, and another of brass and bell-metal utensils, the property of the prosecutor, which he was in the act of carrying off. He admitted his guilt at once, and pointed out the way in which he had effected an entrance, namely, by climbing over the wall with the aid of a bamboo covered with straw: the grain and utensils were taken from within the prosecutor's house. The prisoner also made a statement regarding a companion who was said to have aided him in the commitment of the theft, and it is in evidence that, on the prisoner's house being searched, property sworn to by the prosecutor was found in it.

I see no reason, therefore, to interfere with the Sessions Judge's conviction, and, with regard to the amount of punishment, observe that the prisoner is an old offender,

Vol. V. having been already five times imprisoned for theft, and a severe punishment is necessary.

I remark, for the guidance of the Sessions Judge in future cases of this kind, that records of previous convictions should not be put in until the prisoner has been convicted in the case then under trial. They are of use only in determining the amount of punishment to be inflicted, and are no evidence in the case.

The 16th April 1866.

Present :

The Hon'ble L. S. Jackson, *Judge.*

Theft—Meaning of dishonest intention.

Miscellaneous Case.

Queen versus Preonath Banerjee.

Meaning of *dishonest* intention in a case of theft as defined in the Penal Code.

I HAVE had the papers in this case before me, and have heard the vakeel for the petitioner.

It does not appear to me that any ground is made out which would justify the interference of this Court.

The objection for the first time taken here, *vis.*, that the facts alleged cannot constitute the offence of theft as defined in the Penal Code, is not established.

The argument urged is that there was no dishonest intention on the part of the appellant; but the meaning attached to the word "dishonest" in the Penal Code must be borne in mind.

The term is applied to a person who does any thing with the intention of causing wrongful gain or wrongful loss. Now, admitting that the husband of the prosecutrix, in this case, may have owed something in his lifetime to the prisoner, the forcible and illegal seizure of her bullocks in satisfaction of such claim would certainly amount to causing wrongful loss to her, and to refer her to a Civil Court for satisfaction of such a wrong would be a denial of justice. As to the credibility of the witnesses, that is not within the province of this Court in the present stage of the proceedings.

The 16th April 1866.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

**Abetment of forgery of valuable document—
Judge's charge to the Jury.**

Queen versus Jehan Buksh.

Committed by the Deputy Magistrate, and tried by the Sessions Judge, on a charge of abetment of forgery.

How a Judge should charge the Jury in a case of abetment, while present, of the forgery of a valuable document.

WE have heard Mr. Warner, the Counsel who has appeared for the prisoner, as well as Mr. Twidale; and we are satisfied that there must be a new trial in this case.

The prisoner was arraigned, with two others, under no less than 4 Sections of the Penal Code, being Sections 465, 467, 471, and 474. The other two prisoners were acquitted without being put on their defence. The prisoner, appellant, was convicted of abetting, while present, the forgery of a valuable document, being the sale of a house, under Sections 114 and 467.

The evidence for the prosecution is as follows. The prisoner is stated to have given to one Gholam Abbas a draft of a deed of a sale, which this person, who has appeared as a witness, engrossed on a blank stamp paper in a shed in the compound of the Kutcherry. The deed is in favor of the acquitted prisoners Abdool Wahed and Bahir Ally. At the time of the execution, the prisoner pointed out a certain person as Bafatee, the owner and vendor of the property, which was a shop. Bafatee now denies that he was ever present at the execution of the deed, or that he made or consented to any such sale. This statement was corroborated by other witnesses.

The deed of sale was afterwards produced before the Magistrate in a case in which the possession of the property, conveyed by the above deed, was contested. But it does not appear that it was produced by the prisoner. The suit was brought by the two prisoners who have been acquitted against certain coolies who were alleged to have committed a trespass, and there is no evidence to shew that it was filed by Jehan Buksh. The record of the trespass case, on the contrary, would appear to shew that it was filed by the plaintiffs, *vis.*, the acquitted prisoners

There is, however, a general statement by witness Kissen Guty No. 17, that the appellant was looking after the case. A great deal of evidence was then taken for the defence, and the prisoner, as we have shewn above, was found guilty, and sentenced to seven years' transportation.

The above details are, however, not to be gathered from the Judge's charge, which, we regret to say, is altogether inadequate to the ends of justice in a case which presents several complications and difficulties. We have been compelled to collect the facts from the evidence, and we are quite certain that the Jury have not had that evidence analysed and presented to them in a proper shape, or in one calculated to make them feel how each detail or statement of fact bears upon the guilt or innocence of the accused. The Judge says in the commencement of his charge:—

"The case has already occupied so much of your time (two entire days), and the evidence has been so fully commented on by the vakeels for both sides, that I shall only trouble you with some very brief remarks."

The above charge might possibly meet the requirements of a very simple case which turned on a mere question of identity or on the evidence to one specific or distinct act, but it is wholly unsuited to the necessities of an important and difficult case, in which, moreover, it is quite clear that there has been a great deal of party feeling and local excitement. The Judge's charge, we regret to say, evinces great ignorance of what a Judge's charge should be, how facts should be analysed and arranged for the consideration of jurymen, and how the Jury ought to be told what inferences they might fairly draw from facts, if they credit the same.

In the present case there is an absolute want of any direction at all on several points affecting the prisoner. It is also not very clear to us at present how the prisoner has been found guilty of abetting an act, while Gholam Abbas, the writer, has been allowed to give evidence, and while the other persons who were to have benefited by the deed, and who actually pleaded in Court the deed now impounded, have been summarily acquitted without even being called on for their defence. We do not understand who is supposed to have committed the forgery which the prisoner is found guilty of having abetted.

The Judge will summon an entirely new Jury for this case.

We cannot accede to the request of the prisoner already preferred to the Judge, that the Jury shall consist exclusively of Europeans; but the prisoner, at the new trial, may be entitled to any privilege which he can claim under Section 325 of the Criminal Procedure Code. The Judge will then re-take all the evidence that bears on the prosecution, and allow the prisoner to urge anything in his defence, and to adduce his witnesses. In presenting the Jury with a clear statement of the facts which the evidence may disclose, and in telling them that they are to exercise their own judgment in deciding on the credibility of the same, he will be careful to put before them one point which the Counsel before us has strongly urged, *viz.*, whether, supposing the Jury to believe the evidence for the execution of the deed, and for the personation of Bafatee, the prisoner may or may not have simply appeared in his professional capacity, or whether he has or has not acted without any corrupt motive, and simply for the benefit and under the direction of others. To sustain such a conviction, a corrupt motive must be shewn, or must be fairly inferrible from the evidence. The Judge will also carefully cross-examine the witnesses who speak to certain speeches said to have been made by the prisoner to other witnesses, and he will endeavour to ascertain whether they were really uttered, under what circumstances, and with what intent and meaning.

The Judge will understand that we give no opinion whatever on the value of the evidence for the prosecution; we only indicate to him its bearing and importance, as well as the paramount necessity, in a case where party feeling runs high, of giving the Jury a dispassionate statement of all the evidence, of pointing out how it bears on the guilt or innocence of the accused, and of telling them what legal inferences, if credited, it will lawfully sustain.

The Judge will do well to give our remarks a careful perusal; and, as the offence with which the prisoner is charged is not a bailable offence, the trial should be proceeded with with the least practicable delay. It is, of course, impossible to put the two prisoners acquitted summarily on their trial again, or to try the prisoner on any other charge, but one under 467 and 114. The prisoner may, however, if he thinks fit, summon these acquitted persons as witnesses for his defence.

The 16th April 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell,
Judges.

Confessions of Prisoners.

Criminal Jurisdiction.

Referred under Section 434 of Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Queen versus Chokoo Khan and another.

The whole, and not part, of a prisoner's confession must be taken in order to his conviction.

Campbell, J. This is a case referred to us by the Magistrate of Pooree, with respect to Chokoo Khan only, under Section 434 of the Criminal Procedure Code. The prisoner has been convicted by the Assistant Magistrate of receiving stolen property knowing it to be stolen.

The prisoner Chokoo Khan, on being asked whether he was guilty of receiving stolen property knowing it to be stolen, replied, "No, I know nothing whether the property is stolen or not." Upon this the Assistant Magistrate records the following finding: "Both the accused confess;" and thereupon he sentences Chokoo Khan and his fellow-prisoner to rigorous imprisonment for 6 months each.

It is quite clear that Chokoo Khan did not confess to the offence with which he was charged, and there is, therefore, gross irregularity in the proceedings of the Assistant Magistrate. The trial is quashed, and a new trial of Chokoo Khan is ordered.

It is true that Chokoo Khan admits that the stolen property was brought to his house, and adds: "I told him" (that is, the thief) "put the things down." This is an admission which, *pro tanto*, might be taken against him, but the evidence implicating him in the offence of receiving stolen property knowing it to be stolen should also have been recorded. I regret that the Assistant Magistrate should have conducted the proceedings in such an irregular manner.

Norman, J.—I desire to add a few words. The prisoner Chokoo said, in answer to the question, whether he was guilty of receiving stolen property knowing it to be stolen, "No, I know nothing about whether the property is stolen or not. My son Mahobee Khan brought the rice, the ladies, the hinge,

the pumpkin, the kalaree, and the two brazen plates to my house. I told him to put the things down."

Now, if it had been proved as a fact, which it was not in this case, that immediately before the property had been brought to the prisoner's house it had been stolen from the prosecutor, and if it should appear, from the nature of his son's position and circumstances, that Chokoo Khan must have known that the article so brought could not have been come by honestly, he might have been convicted on such evidence. But, as the Assistant Magistrate relies on the confession of the prisoner, he must take the whole, and cannot reject any part of it.

Probably the prisoner will have very little benefit from the remand in this particular case; but, although the consequences to the prisoner are probably of little importance, it is of the greatest possible importance that trials should be properly conducted by the Lower Courts.

The 16th April 1866.

Present :

The Hon'ble L. S. Jackson and F. A. Glover,
Judges.

Forgery—Mooktearnamah—Contradictory evidence (to be noticed by Judge to Assessors).

Queen versus Burjo Barick and two others.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Cutlack, on a charge of cheating.

By a person consenting to act under a Mooktearnamah, and attaching his name in token of such consent, he does not become a maker of the Mooktearnamah, or a forger if the Mooktearnamah turns out to be forged.

It is the duty of the Judge to notice to the Assessors discrepancies and contradictory statements made by witnesses.

In this case we see no reason to interfere with this conviction or sentence.

We cannot, indeed, agree with the Sessions Judge in holding that a person who consents to act under a Mooktearnamah, and attaches his own name in token of such consent, is thereby a maker of the Mooktearnamah, and becomes a forger if the Mooktearnamah turns out to be forged.

But in this case it appears from the evidence that the prisoner No. 2, Bhujui Ma-bauty, was actually present, and took part in the forging of the Mookhtearnamah; and we agree with the Judge in over-ruling the opinion of the Assessors.

The Judge remarks that they "do not seem to have noticed the gross discrepancies and impossible statements" made by the witnesses for the defence. But he ought to have brought these statements to the notice of the Assessors, if they did not notice them of themselves.

The 17th April 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell,
Judges.

False Evidence.

Queen versus Fazul Meeah and another.

Committed by the Deputy Magistrate of Cachar, and tried by the Deputy Commissioner of Cachar, on a charge of giving false evidence.

A charge of giving false evidence should specify the false evidence which the prisoners are supposed to have given.

Norman, J.—The prisoners have been convicted before Captain Stewart, the Deputy Commissioner of Cachar, of giving false evidence.

The manner in which the case has been tried is very unsatisfactory. The charge does not specify the false evidence which the prisoners are supposed to have given. From some paper sent up with the case, it appears that the prisoner Jaffer charged Debanundo with killing a buffalo calf. Their story is not a very probable one, and no doubt the charge of killing the buffalo calf was properly dismissed.

But the counter-charge, which is one of perjury against the prisoners, is not proved. There is no substantial corroboration of the story of Debanundo: the evidence is vague as to time and place. Had the Deputy Commissioner, in trying the case, insisted on each witness giving minute details of the facts which he alleges himself to have witnessed, with time and place, we might have been able to form an opinion, from a comparison of the statements of the several witnesses, whether they were speaking the truth or not.

The prisoners must be acquitted.

Campbell, J.—I concur in thinking that the alleged false evidence is not proved, and in releasing the prisoners.

The 18th April 1866.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble J. P. Norman and G. Campbell, *Judges.*

Abconding—Warrant to apprehend offender, not an order within meaning of Section 172, Penal Code.

Criminal Jurisdiction.

Queen versus Womesh Chunder Ghose.

Held by the majority of the Court (Campbell, J., dissenting) that a warrant addressed to a Police Officer to apprehend an offender and to bring him before the Magistrate is not a "summons, notice, or order" within the meaning of Section 172 of the Penal Code, and that the offence of abconding by an offender against whom a warrant has been so issued is not punishable under that Section.

Norman, J. (Peacock, C.J., concurring).—This is a case which comes before us under Section 404 of the Code of Criminal Procedure.

On the 26th of October last a warrant was issued by the Magistrate of Jessore against one Womesh Chunder Ghose, a Collectorate Mohafiz, on a charge of forgery committed in the office. Womesh Chunder disappeared, and could not be found till the 30th of November, when he delivered himself up to the Magistrate. The Magistrate found that he left Jessore on the 26th of October after the issue of the warrant, that he must have known of the issue of the process, and that he set the law at defiance; and sentenced him to three months' simple imprisonment.

The Sessions Judge, Mr. Lawford, on appeal, reversed this sentence, holding that the prisoner could not be convicted under Section 172 of the Indian Penal Code.

Some correspondence having ensued between the Sessions Judge and the Magistrate as to the correctness of the Sessions Judge's decision, the papers have been sent for under Section 404.

I am of opinion that the conviction is bad, and was properly reversed by the Sessions Judge on appeal.

Section 172 provides that "whoever absconds in order to avoid being served with a

Vol. V. *summons, notice, or order* proceeding from any public servant legally competent, as such public servant, to issue such summons, notice, or order, shall be punished," &c. Now, a warrant, which directs a bailiff, constable, or Police officer to apprehend an offender, and produce him before the Magistrate, is *neither a summons, notice, nor order* to such offender. It is an order to the party to whom it is addressed to produce the offender, but not to the offender himself.

The offence of absconding by an offender against whom a warrant has been issued is dealt with in a different manner. By Section 183 of the Code of Criminal Procedure, if the person accused absconds, so that the warrant cannot be served, the Magistrate, if satisfied that he absconds, &c., for the purpose of avoiding service, may issue a written proclamation requiring him to appear to answer the complaint within a fixed period, if not less than 30 days. If he intentionally omits to attend in obedience to such proclamation, he is liable under Section 174 of the Indian Penal Code, if the proclamation is to attend in a Court of Justice, to imprisonment for six months.

Under Section 184 of the Code of Criminal Procedure the Magistrate may in the meantime attach the property of the party absconding.

In the present case, it seems that a proclamation issued, and Womesh Chunder did appear within the time limited by it.

There is no ground for interference with the Judge's order.

Campbell, J.—The law does not require that the order should be an order addressed to the person inculpated. A warrant is certainly an *order*. The only doubt might be whether an officer who goes with a warrant to apprehend a man can be said to serve him with the warrant, and that doubt is, I think, set at rest by the use of the term "If the warrant cannot be served" in Section 189 of the Code of Criminal Procedure.

I am, therefore, of opinion that a person, who absconds to avoid being served with a warrant in the above sense, may be properly convicted under Section 172 of the Penal Code.

I may add that the persons who avoid service of summons, and who are undoubtedly punishable under Section 172, are also liable to the process of attachment, &c.; so that the mere circumstance of such a procedure being provided by no means leads to the inference that specific punishment cannot also be inflicted.

The 23rd April 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges*.

False Evidence.

Queen versus Bykunt Nath Banerjee.

Committed by the Assistant Magistrate of Boodhood, and tried by the Sessions Judge of East Burdwan, on a charge of "false evidence."

An enquiry by an Assistant Magistrate with a view to tracing the writer of an anonymous letter addressed to him charging certain persons with murder, and without reference to the truth or otherwise of the charge of murder, is not a stage of a judicial proceeding in which the giving of false evidence is punishable under Section 193 of the Penal Code.

THE prisoner in this case has been found guilty, under Section 193 of the Penal Code, of giving false evidence in a stage of a judicial proceeding, and has been sentenced to rigorous imprisonment for one year.

The false evidence is alleged to have been given in this wise: The Assistant Magistrate received an anonymous communication charging certain persons with murder; but before taking any steps to ascertain whether there were grounds for the charge, or whether indeed any murder had been committed, the Assistant Magistrate endeavoured to trace the writer of the letter, and satisfied himself (how we are not told) that the prisoner Bykunt Nath had something to do with it. Acting on this conviction he examined Bykunt Nath on oath, and elicited from him "that the letter was written by a Brahmin from a village on the banks of the Damooda, but that he did not know his name."

This statement was subsequently found to be false by the prisoner's own admission for, when afterwards put upon his defence he allowed that the writer was one Sham Dutt.

We do not think, however, that the conviction of the prisoner under Section 193 can stand. The Assistant Magistrate's original proceedings had no reference to the truth or otherwise of the charge of murder as supposed by the Sessions Judge in his charge to the Jury, but was directed simply to the anonymous letter. Now, the writing of such a letter was, in itself, no offence and the enquiry regarding it was not, in any sense of the term, a stage of a judicial

proceeding which might have terminated in a judgment. The Sessions Judge has apparently gone on the mistaken idea that the prisoner's first statement was taken during the investigation into the charge of murder; but this is not so. The Assistant Magistrate himself distinctly states that all his proceedings, touching the anonymous petition, were taken before enquiring into the truth or falsehood of the charge of murder.

We think, therefore, that the Sessions Judge misdirected the Jury in telling them that the original statement of the prisoner was made in the stage of a judicial proceeding, and that the conviction, under Section 193 of the Penal Code, must, in consequence, be reversed.

It may possibly be that the prisoner would be liable to punishment under some other Section of the Penal Code, though we do not at all say that he would be so.

But, under the circumstances of the case, we certainly should not think it proper to direct that any further charge be framed, and we direct that the prisoner be discharged.

The 7th April 1866.

Present:

The Hon'ble L. S. Jackson, G. Campbell, and
A. G. Macpherson, *Judges.*

Murder—Right of private defence.

*Reference under Section 380 of the Code of
Criminal Procedure.*

Queen versus Durwan Geer.

Held by the majority of the Court (Campbell, J., dissenting) that, when a person wilfully killed another whilst endeavouring to escape after having been detected in the act of house-breaking by night for the purpose of theft, the offence committed was murder, and could not be considered to have been committed in the exercise of the right of private defence, either of person or property, nor under grave and sudden provocation.

Jackson, J.—In this case, it appears to me that the prisoner has committed murder as defined in the Penal Code.

He intentionally killed, with two blows of a kodalee, a man named Muhubir, whom he had caught in the act of committing house-breaking by night in his house.

The offence is not reduced so as to be culpable homicide not amounting to murder by reason of its coming within any of the Exceptions annexed to the 300th Section of the Code. The prisoner was not deprived of the power of self-control by grave and sudden provocation, nor was he exercising in good faith the right of private defence of property

without any intention of doing more harm than was necessary for the purpose of such defence.

The thief was endeavouring to escape, but it does not appear that he was likely to escape, except that it is stated that he was a powerful man.

But the prisoner called for the kodalee with the express purpose of killing him, and, the kodalee being brought, killed him on the spot accordingly.

The right of private defence of property extends, in the case of house-breaking by night, to the voluntary causing of death to the wrong-doers, and it continues as long as the house-trespass begun by the house-breaker continues; but it is subject to the restriction contained in Section 99, that it "in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of self-defence."

If the prisoner had intended to inflict such injury on the thief as would have prevented him from escaping, and had, in so doing, accidentally killed him, the case probably would have come under the 2nd Exception to Section 300.

But the prisoner tells us that he intended to kill the thief, and it is impossible to suppose that killing was necessary for the purpose of defence.

Under the circumstances stated by the Judge, I certainly could not confirm the capital sentence which has been passed, but I cannot lawfully pass a less sentence than transportation for life.

Campbell, J.—In sentencing the prisoner Durwan Geer to death, it appears to me that the Judge has acted under a misconception of his duty, for he immediately after proceeds to state a variety of extenuating circumstances which may induce the High Court to mitigate the sentence; and it is, I think, patent in the judgment that he does not really himself think that the prisoner ought to be executed. There can be no doubt that the case is not one in which the more severe of the punishments sanctioned by law should be inflicted. But, further, with regard to the conviction for murder under which Durwan Geer must be sentenced—and Surwan Geer has been and can be sentenced—to no lesser punishment than transportation for life, I have an extreme repugnance to so construing the Penal Code that our hands are tied, and we are forced to inflict a punishment much greater than that which, on general grounds, we should deem that the offence deserves. My hon'ble

Vol. V. colleague who first sat with me in this case did, I believe, think it one in which a recommendation for the mercy of the Executive Government might properly be made. That is a very proper course in England, where the law designedly affixes very high punishments to certain offences, and leaves it to a Minister of State to advise Her Majesty whether the sentence should be carried out under Her Majesty's warrant or should be mitigated. But in this country I do not think that the law contemplates such a course. Under the Penal Code and Code of Criminal Procedure the very widest discretion is usually left to the Judge. Even a capital sentence is carried out without any reference to, or warrant of, the Executive Government, and the interference of the Government must be altogether extraordinary and incidental. In the case of murder, the Penal Code narrows the discretion of the Judge to the alternative punishments of death or transportation for life; but then it has always seemed to me to be the spirit and intent of the Code that the term murder should be confined to the very narrowest class of most heinous homicides for which no reasonable excuse or extenuation can be found, and that we must consider the law very fully, and construe it very liberally, before we feel ourselves bound to bring under the head of murder a homicide which our ordinary sense and feelings cannot class as an offence of so deep a dye.

In this spirit, then, I look at the offence before us and at the law on the subject.

It is patent that the prisoner killed the deceased in the very act of committing house-breaking by night for the purpose of theft. I may also premise that the circumstances were such that, if the prisoners had only remained silent or told a story more favorable to themselves, no offence could be charged against them. Beyond their own statements, there is not a tittle of evidence even to suggest that they exceeded the ordinary right of private defence which justifies the killing of a house-breaker by night. But, apparently not viewing their own conduct in a culpable light, they have volunteered statements which have placed them in their present position. It appears that the first prisoner was alarmed by the boy (the second prisoner), and coming up caught the deceased burglar in the act of coming through the hole in the wall and entangled in the hole. The deceased was, as the Judge says, "a very powerful man." The prisoner, it is shewn, shouted lustily for assistance,

and (as remarked by the Judge), if the chowkeedar had done his duty instead of going off half a mile to call the gorait, the deceased would not have been killed. But, as the Judge goes on to narrate in his judgment, the prisoner could get no assistance, the deceased would not tell who he was, and "fearing escape" the first prisoner called to the boy to bring the kodalee. The boy fetched the kodalee from a few yards' distance, and then and there the first prisoner struck the deceased two blows which killed him. Insufficient as is the protection afforded to the people of this country against burglars and dacoits, and constant as is our complaint that they generally shew too little energy in protecting themselves, I confess that I feel much sympathy for a man who has only shewn a little too much energy in dealing with a house-breaker. But I must look to the law of the case. To begin with, it seems to me to be entirely a misapplication of terms to speak of this act as done *deliberately*. It may seem deliberate now in the narration, but I think it evident that the whole transaction took much less time than it takes to tell. The prisoner was struggling with a very powerful burglar, and calling for assistance which did not come. I take the refusal to tell his name to be a refusal to surrender, and the Judge is, I think, justified in saying that the prisoner, "fearing escape," knocked him on the head. As the fetching the kodalee probably did not take many seconds, I think that the thing was done, not deliberately, but in the very heat and excitement of the struggle. It was a dark night, some property of the prisoner had actually been taken, and the prisoner might well suppose that, if the burglar escaped, he would or might take property with him; there was neither time nor light to see whether he was going empty-handed. I cannot find any very distinct provisions of the law regarding the degree of violence that may be used to prevent the escape of a thief or robber, but I cannot doubt that, as observed by my brother Jackson, the prisoner would have been justified if he had only inflicted such injury as was necessary to prevent escape. As respects private defence of property, the Penal Code seems at first sight very distinctly framed to meet such cases as that before us. It is lawful, by way of defence, to kill a house-breaker by night (Section 103), and such right continues so long as the house-trespass continues (Section 103, Clause 5), and also (Clause 2) till the offender has effected

his retreat with the property or assistance is obtained. Again, if the right of private defence, being in good faith exercised, is carried to excess, that is, beyond lawful limits, then (Section 300, Exception 2) culpable homicide is not murder, but a homicide of the lesser degree.

Further, when a man kills another under the influence of grave and sudden provocation depriving him of self-control, then also the offence is not murder, but culpable homicide.

There are, however, exceptions within exceptions, and these provisions are qualified by final reservations: "provided that no more harm than is necessary is inflicted," "without any intention of doing more harm than is necessary for the purpose," and so on. Now, I admit that, if we are to construe these provisions very strictly against a prisoner—if we must consider that a man struggling with a powerful burglar must moderate his blows, and calculate them so as, if possible, not to kill, but only to stun him—if we are to measure by seconds the time required for deliberation—and if we are to refuse the benefit of the provision in favor of those acting under the excitement of provocation to such extent as deprives them of self-control to the point of, as it were, temporary insanity—then, no doubt, reasons may be found (and, in my view, too frequently are found) for throwing by far the greater proportion of these cases into the category of murder, contrary, as I think, to the general purview and spirit of the Code. I would, then, construe these provisions in a liberal spirit in favor of the prisoners. I would hold that, if a man in good faith acts for the protection of his person and property and to stop a robber, he is not to be deprived of all benefit of the law because he hits somewhat too hard, provided always that a blow of some kind was really necessary to effect the object in view.

Further, if a man really acted under the excitement of provocation, I would give him the benefit of the mitigated Clause without requiring proof that he was literally transported beyond every possibility of control over his acts.

In this case the prisoners may have carried the right of private defence and the duty of securing the thief a little too far; but, on the double ground that they acted against the burglar under the excitement of provocation, and that they in good faith acted in defence of their property and to secure the burglar, I hold the offence to be

not murder, but culpable homicide. I would reduce the sentence on Durwan Geer to twelve months*, and on Surwan Geer to six months' rigorous imprisonment. As my colleagues hold that the law binds them to convict for murder, and to pass the severe sentence prescribed, I hope that they will join me in recommending mitigation to his Honor the Lieutenant-Governor.*

Macpherson, J.—I think it is quite clear that the prisoner has committed the offence of murder. He did, and intended to do, far more harm to the deceased than was necessary for any purpose of defence, either of person or property. Therefore his case does not fall within Exception 2, Section 300 of the Penal Code, and what he did cannot (with reference to Exception 4, Section 99) be considered to have been done in the exercise of the right of private defence at all. The right of private defence is for protection, and not for punishment, and it is impossible to say that, in acting as he did, the prisoner acted merely for his own protection.

The case does not fall within Exception 1, Section 300, because there is nothing whatever to shew that the prisoner caused the deceased's death whilst deprived of the power of self-control. On the contrary, it appears on the evidence that the prisoner knew perfectly well what he was about, and acted with deliberation. The kodalee with which the murder was committed was not a weapon lying immediately at hand, seized by the prisoner, and used in the heat of sudden passion. It was brought to him by his brother from another house or room by the prisoner's order and for the express purpose of killing the deceased, whom the prisoner had on the ground, and was holding there.

In my opinion, the prisoner ought to be sentenced to transportation for life.

The 28th April 1866.

Present:

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

Abetment of Grievous Hurt—Murder.

Queen versus Goluck Chung and others.

Committed by the Officialing Joint Magistrate, and tried by the Sessions Judge of

* NOTE.—The Lieutenant-Governor subsequently commuted the sentence passed on Durwan Geer to one year's rigorous imprisonment, and that on Surwan Geer to six months' rigorous imprisonment.—E.D.

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Sylhet, on a charge of culpable homicide amounting to murder.

The prisoners having abetted an assault, and murder having been committed—HELD, under the peculiar circumstance of the case, that they were guilty of abetment of grievous hurt, and not abetment of murder.

Campbell, J.—Upon the whole, I do not think that the appellants abetted Sheikh Khawuz with the knowledge that he was likely to commit murder, but only with the intention of assaulting the deceased, and with the knowledge that deceased might suffer grievous hurt. I would, therefore, alter the sentence passed on the appellants to that which I should deem proper on a conviction for abetting grievous hurt, under the circumstances, *viz.*, 3 years' rigorous imprisonment.

Macpherson, J.—I also think that these prisoners ought not to be convicted of murder, or to be sentenced for that offence. I am not satisfied that any of them struck the deceased as alleged in the evidence. The case against the prisoners seems to me to go no farther than that they went out to assist in beating the deceased. Intending to hurt him, they are, no doubt, liable for any hurt or even grievous hurt done him. But the killing the deceased in the manner in which he was killed by Khawuz went so far beyond the purpose for which these prisoners seem to have gone out, that I do not look upon the murder which he committed as an act done in furtherance of the common object. The act abetted was different from the act done, and the act done was not the probable consequence of the abetment. I do not think that the prisoners knew that the hurt abetted was likely to cause death, or that they intended it to cause death. As the prisoners were abettors, and were present, I think they should be punished as for grievous hurt. I concur in the proposed sentence of three years' rigorous imprisonment.

The 30th April 1866.

Present :

The Hon'ble L. S. Jackson and F. A. Glover,
Judges.

Compensation (under Section 44, Code of Criminal Procedure)—Damages.

Queen versus Barjoo Koormee and another.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Gva, on a charge of grievous hurt.

The compensation awarded under Section 44 of the Code of Criminal Procedure to the person injured in consideration of the loss which he has suffered, corresponds to damages awarded in civil proceedings.

We think the Judge's order is quite legal. The compensation awarded under Section 44 of the Code of Criminal Procedure to the person injured in consideration of the loss which he has suffered corresponds to "damages" awarded in civil proceedings.

The discretion allowed to the Judge is very wide.

The 7th May 1866.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Imprisonment (in default of fine)—Contempt (Refusal to answer public servant).

Criminal Jurisdiction.

Referred under Section 434 of the Code of Criminal Procedure and Circular Order No. 18, dated 15th July.

Queen versus Jogeshur Roy.

Simple, and not rigorous, imprisonment can be inflicted in default of payment of a fine imposed on an offender convicted under Section 179 of the Penal Code for refusal to answer a question demanded of him by a public servant on a subject on which he was legally bound to state the truth.

We are of opinion that the offence committed by the accused comes under the provisions of Section 179 of the Penal Code, the accused having refused to answer a question demanded of him by a public servant on a subject on which he was legally bound to state the truth.

The Deputy Magistrate is clearly wrong in stating that he disposed of the case under Section 21, Act XXIII. of 1861, as we find that he made over the accused for trial before himself in his capacity of Deputy Magistrate, and punished him under Section 228 of the Penal Code.

The infliction of rigorous imprisonment in default of payment of the fine was clearly illegal, and we accordingly order that simple be substituted for rigorous imprisonment.

As the accused has been guilty of an offence under Section 179 of the Penal Code, and as the amount of fine is not excessive, and has been paid, we see no reason to take further action in the matter. The Judge will be instructed accordingly.

The 7th May 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

False evidence—Corroboration.

Queen versus Mohina Chunder Chuckerbutty.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Jessore, on a charge of false evidence.

In a case of giving false evidence, the strictest and most accurate proof is necessary, and the testimony of a single witness unsupported by corroborative evidence is insufficient for a conviction.

We think that on this record the conviction for giving false evidence is bad. The false evidence with which the prisoner is charged is his having deposed, in the course of a suit in the Small Cause Court at Jessore, that he had paid a certain sum of six rupees and nine annas to one Rutheeram Nath, the prosecutor. On such a charge, we should have expected to find that the prosecutor was asked expressly whether the prisoner did or did not pay him the rupees 6-9 referred to; yet no such question seems to have been asked, and there is no express denial by the prosecutor that he received that sum. It is true prosecutor swore that the receipt for rupees 6-9, purporting to be signed by him, which the prisoner produced, is a forgery; but its being a forgery is not inconsistent with the possibility of the truth of the statement that the money was in fact paid. It is also true that, from the whole of the prosecutor's evidence, an inference may be drawn that he meant to depose that he never did receive the rupees 6-9; still, in a case of giving false evidence, the strictest and most accurate proof is essential, and when the question is as to an alleged pay-

ment as in the present instance, the Court ought to have put the question directly to the prosecutor in the express terms made use of by the prisoner in the Small Cause Court.

Further, the testimony of a single witness, unsupported by corroborative evidence, is insufficient to convict a person charged with giving false evidence (*see Reg. vs. Lall Chand Kowrah*, 5 W. R. C. R. 23). In the present case, the evidence of the prosecutor is, in our opinion, wholly uncorroborated. The evidence of the two witnesses who say that the prisoner applied to them to give false evidence in his behalf, to prove the receipt or the payment of the money, in the Small Cause Court, seems to us wholly worthless and unreliable. Then the question being whether the prisoner did or did not pay rupees 6-9 to the prosecutor, we are at a loss to see how any corroboration of the prosecutor's statement is to be found in evidence as to the mode in which the prosecutor usually keeps his books or transacts his business. Finally, we see no corroboration, to which we attach any weight, in the fact that, when taken before the Sessions Judge in order to be committed for trial for giving false evidence, the prisoner in general terms said he had committed a fault, and prayed to be let off. We do not think that such expressions, made use of under such circumstances by a person of the prisoner's class, can in any degree be relied upon as proof of his being guilty of the offence with which he is charged.

On the whole, we consider the conviction on the charge of giving false evidence is bad. Nevertheless, under Section 426 of the Code of Criminal Procedure, we shall not reverse or alter the finding or sentence of the Lower Court, because it appears to us that the prisoner might on the evidence—the testimony of one witness being in law sufficient, and the Lower Court having accepted the evidence of the prosecutor as true—have been properly convicted of the offence of dishonestly using as a genuine document the receipt which he knew, or had reason to believe, to be a forged document (Section 471 of the Penal Code). For this offence he might have received a more severe sentence than that which has been passed upon him. And, as the accused has not been prejudiced by the defect in the proceedings, we dismiss the appeal.

The prisoner ought to have been charged with giving false evidence, and also under Section 471.

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The 9th May 1866.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Murder—Culpable Homicide not amounting to Murder.

Queen versus Tephrah Fukeer and others.

Committed by the Officiating Joint Magistrate, and tried by the Sessions Judge of Rungpore, on a charge of grievous hurt.

A person who beats another brutally and continuously so that the back of the victim is reduced to a state of pulp, and yet studiously avoids breaking a bone (the very fact of his taking such a precaution evincing deliberation), is guilty of murder or culpable homicide not amounting to murder, according as there may or may not have been grave provocation.

THESE three prisoners have been convicted, by the Sessions Judge of Rungpore, of voluntarily causing "grievous hurt," Section 325, Indian Penal Code. The sentence is five years' rigorous imprisonment. We may observe that the Assessors acquitted the prisoners Churkotoo and Pelkoo. These prisoners were also discharged by the Joint Magistrate, but were subsequently committed under the orders of the Sessions Judge. The prisoner Tephrah Fukeer was committed on a charge of culpable homicide not amounting to murder, to which the Sessions Judge added the charge of voluntarily causing grievous hurt.

We have considered the whole of the evidence. It appears clear that there was an intrigue between the deceased and the wife of the prisoner Tephrah Fukeer. It is stated that this connection had been broken off, but we are doubtful of the truth of this statement. This much is established by the evidence, that, on the night of the murder, the deceased went to the house of Tephrah Fukeer (he at the time being absent); but whether he went there by assignation or with a view, as stated by the wife of the prisoner, to have forcible connection with her, is not so clear. That the deceased

was cruelly beaten is clear from the evidence of the medical officer, who deposes "that the cause of death was compression of the brain and injury to the spinal chord, the result of a severe beating on the back, most probably inflicted with a bamboo." The Civil Assistant Surgeon further stated that "the muscles of the back were reduced to a state of pulp, and were infiltrated with blood to below the knee. There was no rupture of the spleen or any other organ."

The Sessions Judge observes "that it is true that the deceased was beaten in a 'brutal' manner, but there were no bones broken or any beating about the head; nor was any dangerous weapon used, and from the marks being all over the back, it would seem that the accused did not intend to inflict any injuries on any known vital portion of the body; and therefore I think that the intention to cause such bodily injury as was likely to cause death, or that a guilty knowledge that death was likely to ensue, cannot be imputed to the prisoner."

From this it would appear that, in the Judge's opinion, a party who beats another brutally and continuously, so that the back of the victim is reduced to a state of pulp to below the knee, so long as he studiously avoids breaking a bone (and the very fact of his taking the precaution evinces deliberation), is not guilty of murder. We give the prisoner the benefit of the grave provocation he received; but, taking his own admission as disclosed in his statement before the Joint Magistrate, we find that he was satisfied of the innocence of his wife on the night in question, and that no sexual intercourse had taken place on that occasion between her and the deceased. He also admits that he returned to the attack upon the deceased, and we find that he took undue advantage, and acted in a cruel and brutal manner. We therefore convict the prisoner Tephrah Fukeer of culpable homicide not amounting to murder. The sentence may stand.

There is no evidence against the other prisoners beyond that of the wife of the prisoner Tephrah Fukeer; and, as her statements before the Joint Magistrate and the Sessions Judge differ widely, we do not think it would be safe to convict these prisoners. We therefore acquit them in concurrence with the opinions of the Assessors and Joint Magistrate.

The 14th May 1866.

Present :

The Hon'ble L. S. Jackson and F. A. Glover, *Judges*.

Disputed possession—Oral evidence.

Miscellaneous case.

Maharajah Gobind Nauth Rai

versus

Rajah Anund Nauth Rai.

Oral evidence is the principal matter upon which Magistrates can proceed in determining a question of possession under the Code of Criminal Procedure.

We are decidedly of opinion that the order of the Joint Magistrate in this case must be set aside. Being directed by this Court to hold an enquiry into the subject-matter under Section 318 of the Code of Criminal Procedure, the Joint Magistrate has confined himself to examining the documents produced, and has refused to hear the witnesses whom the parties had in attendance. He justifies this refusal by the remark that "to commence to take oral evidence would be to entitle each party to "bring hundreds and perhaps thousands of "witnesses on both sides." Whether the parties would or would not have brought hundreds or thousands of witnesses, they were entitled to have them heard; and we cannot refrain from expressing our surprise that the Sessions Judge, in reviewing this decision, should observe that "the law does "not prescribe any particular form in which "the Magistrate, in cases of this kind, is to "prosecute his enquiries. It simply says "the Magistrate shall call on all parties to "state their claims, and shall proceed to enquire; but that enquiry, not being in any "way defined or limited, may be an enquiry "based upon parol evidence or documentary "evidence, as the case may be."

Now, it is quite manifest that documentary evidence would at the best be a most unsafe guide in determining a question of possession. Both in cases under Act IV. of 1840, and under the Sections of the Code of Criminal Procedure which with certain modifications continue a portion of that law, oral evidence always has been, and must be, the principal matter upon which Magistrates can go.

The Joint Magistrate's order is therefore set aside. We express no opinion upon the necessity for making this enquiry under Section 318. The enquiry has been ordered by competent authority, and must be carried out in a lawful manner.

The 17th May 1866.

Present :

The Hon'ble F. B. Kemp, *Judge*.

Plea of Intoxication.

Queen *versus* Bodhee Khan.

Committed by the Assistant Magistrate of Aurungabad, and tried by the Sessions Judge of Gya, on a charge of grievous hurt.

Voluntary intoxication is not a valid plea for an offence.

This is a very clear case. The prisoner wounded his uncle and another person with a sword most severely. The two men were for a long time in the hospital, and were for more than twenty days in severe bodily pain, unable to follow their ordinary pursuits.

The prisoner pleads intoxication, but there is no proof of this plea; and, if drunk at all, he was voluntarily drunk (Section 85 of the Indian Penal Code). Taking the aggravated circumstances of this case into consideration, the sentence is not too severe.

I reject the appeal, and confirm the conviction.

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The 29th May 1866.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, W. S. Seton-Karr, L. S. Jackson, and J. B. Phear, *Judges*.

Evidence (of accomplices)—Corroboration—Power of High Court (to set aside conviction and order new trial for error or defect in summing up).

Criminal Appeal No. 75 of 1866.

Elahee Buksh, *Appellant*.

Messrs. T. Barrow, R. T. Allan, R. E. Tvidale, and C. Gregory, *Baboo Romannath Bose, Moulvie Murhumut Hossein, and Moonshee Ameer Ali* for Appellant.

A conviction founded upon the uncorroborated evidence of one or more accomplices alone is valid in law.

The evidence of accomplices should not be left to a Jury without such directions and observations from the Judge as the circumstances of the case may require.

Improper advice given by the Judge to the Jury upon a question of fact, or the omission of the Judge to give that advice which a Judge, in the exercise of a sound judicial discretion, ought to give the Jury upon questions of fact, amounts to such an error in law in summing up as to justify the High Court, on appeal or revision, in setting aside a verdict of guilty.

The power of setting aside convictions, and ordering new trials for any error or defect in the summing up, will be exercised by the High Court only when the Court is satisfied that the accused person has been prejudiced by the error or defect, or that a failure of justice has been occasioned thereby.

This case was referred to a Full Bench by Justices L. S. Jackson and Glover with the following order :

Referring Order.—We are of opinion that this conviction is bad in law, and should be reversed.

The evidence against the prisoner was that of three approver witnesses, two of whom were professional dacoits under the surveillance of the Police, and over whose heads a former conviction for dacoity was pending. The evidence of these persons was in no way corroborated, for the Teelee, who deposes that he sold the 2½ seers of oil to Pauchcowree, Elahee Buksh's servant, could not fix the date of the sale in any satisfactory manner, and, moreover, admitted that Pauchcowree used always to buy oil at his shop in various quantities, at intervals of three and four days. To this may be added that these approver witnesses never mentioned Elahee Buksh's name until they

had been two days in the hands of the Police, and that it was from information received through Elahee Buksh that the first clue to the dacoity was obtained.

The Judge ought to have directed the Jury that the evidence of approvers, and especially of such approvers, ought to be received with great caution, and that under no circumstances would it be legally sufficient evidence unless it were in some way or other corroborated; and he ought further to have told them that it was not corroborated in any way. Instead of thus directing the Jury, the Judge simply left it to them to decide whether the approvers were speaking the truth or not.

This misdirection we consider to have been an error of law, the result of which has been to convict Elahee Buksh on what is not legal evidence.

We think, therefore, that the finding and sentence should be reversed, and the prisoner released.

But it has been brought to our notice that there are conflicting decisions on the point, and that a Divisional Bench of this Court have ruled in the case of the Queen *versus* Godai Raout (V. Weekly Reporter, page 11) that a Jury may convict upon the evidence of an accomplice, though not corroborated so as to show the prisoner's participation in the offence.

They also ruled that Section 28 of Act II. of 1855 did not apply to Mofussil Courts.

And another Divisional Bench, consisting of three Judges, ruled, Queen *versus* Dwarka (V. Weekly Reporter, page 18), that the uncorroborated testimony of an accomplice was not sufficient for conviction.

It has, moreover, it appears, since been laid down by a Full Bench of this Court (7th February 1866, Reg. *versus* Lalchand Kaora, V. Weekly Reporter, page 20) that Section 28, Act II. of 1855, refers to all Courts, Mofussil included.

Under these circumstances, we are not, we conceive, at liberty to pass final orders in this case until the point in question, *viz.*, whether or no the uncorroborated evidence of an accomplice is legally sufficient for conviction, be settled authoritatively, and we accordingly direct that this case be laid before a Full Bench of this Court for the purpose. As the prisoner Elahee Buksh is under sentence of transportation, the Sessions Judge will be directed to suspend the execution of his sentence until the result of this reference be known.

The opinion of the Full Bench will be asked on these points: *first*, whether a conviction can be had on the uncorroborated evidence of one or more accomplices?

Second.—If not, what is the nature of the corroboration required?

Peacock, C. J. (Kemp and Phear, JJ., concurring).—I am of opinion that a conviction upon the uncorroborated testimony of an accomplice is legal. This is not new law, nor founded upon a new principle.

The point was decided in England as far back as the 10th December 1662, after conference with all the Judges.

Several cases to that effect are cited by Sir Matthew Hale in his "Pleas of the Crown," Vol. I., pp. 303-304. He, however, remarks: "Yet, though such a party is admissible as a witness in law, the credibility of his testimony is to be left to the Jury: and truly it would be hard to take away the life of any person upon such a witness that swears to save his own, and yet confesseth himself guilty of so great a crime, unless there be very considerable circumstances which may give the greater credit to what he swears."

In the King *vs.* Attwood, 1 Leach's Crown Cases, p. 404, which is a leading case upon the subject, two prisoners were convicted of highway robbery upon the uncorroborated evidence of an accomplice as to their identity. The question was referred for the opinion of the twelve Judges, who were unanimously of opinion that an accomplice alone is a competent witness: and if the Jury, weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony alone is perfectly legal.

In sentencing the prisoners, Mr. Justice Buller made the following remarks:

"Prisoners, you were convicted of a highway robbery at the last summer Assizes at Bridgewater. The material circumstances of the trial were these. The prosecutor gave in evidence that he was robbed by three men on the day laid in the indictment, mentioning the conversation that passed during the robbery, and proving all the facts that are necessary in law to constitute that offence; but as it was dark, he could not swear to the person by whom it was committed. The accomplice was then called, who swore that he and you had, in company of each other, committed this robbery, and he mentioned all the circumstances that passed, which exactly corresponded with those which the prosecutor had before related. On the

testimony of these two witnesses, the Jury found you guilty; but on a doubt arising in my mind respecting the propriety of this conviction, I thought it proper to refer your case to the consideration of the twelve Judges. My doubt was whether the evidence of an accomplice, unconfirmed by any other evidence that could materially affect the case, was sufficient to warrant a conviction: and the Judges are unanimously of opinion that an accomplice alone is a competent witness, and that, if a Jury, weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony alone is perfectly legal. The distinction between the competency and the credit of a witness has been long settled. If a question be made respecting his competency, the decision of that question is the exclusive province of the Judge: but if the ground of the objection go to his credit only, his testimony must be received and left with the Jury, under such directions and observations from the Court as the circumstances of the case may require, to say whether they think it sufficiently credible to guide their decision on the case. An accomplice, therefore, being a competent witness, and the Jury in the present case having thought him worthy of credit, the verdict of guilty which has been found is strictly legal, though found on the testimony of the accomplice only." His Lordship then passed sentence of death upon the prisoners, but intimated that it was his intention to recommend them to mercy.

In the case of the King *vs.* Jones, 2 Campbell's Reports 131, Lord Ellenborough says: "No one can seriously doubt that a conviction is legal, though it proceed upon the evidence of an accomplice only. Judges, in their discretion, will advise a Jury not to believe an accomplice, unless he is confirmed, or only in so far as he is confirmed; but, if he is believed, his testimony is unquestionably sufficient to establish the facts which he deposes: it is allowed that he is a competent witness, and the consequence is inevitable that, if credit is given to his evidence, it requires no confirmation from another witness. Within a few years, a case was referred to the twelve Judges where four men were convicted of a burglary upon the evidence of an accomplice who received no confirmation concerning any of the facts which proved the criminality of one of the

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See the King *versus* Durham and another, Leach's Crown Cases 478.

At the Old Bailey Sessions, 1784, Smith and Davies were tried for robbing Hunter. During the night the prosecutor was attacked by four ruffians whose persons he was unable to identify, but during the scuffle he had torn a piece of the coat which one of them had on, who, on being discovered by these means, turned King's evidence, and implicated the two prisoners. But the Court, although it was admitted as an established rule of law that the uncorroborated testimony of an accomplice is legal evidence, thought it too dangerous to suffer a conviction to take place under such unsupported testimony, and the prisoners were acquitted.

The law, as above laid down, that a conviction is legal, though supported by the uncorroborated evidence of an accomplice, has been admitted by Lord Denman in *Rex versus Hastings* and another, Carrington and Payne's Reports 152; by Baron Alderson in *Rex versus Wilkes*, 7 Carrington and Payne's Reports 272; and by many other learned and eminent Judges; and it was so ruled by the Court of Criminal Appeal in *Rex versus Stubbs*, 25 Law Journal Reports, Magistrates' Cases, page 16. The law of England, therefore, upon this subject is beyond doubt.

The Law of America is the same, and in that country, where in most of the States new trials are granted in criminal cases, new trials have been refused even when the verdicts were obtained upon the uncorroborated evidence of an accomplice. The cases upon the subject are collected in Wharton's Criminal Law of the United States of America, page 366. It does not appear that, in the cases in which new trials were refused, the Judge who tried the case had omitted to make such observations to the Jury, with reference to the evidence of the accomplices, as the circumstances required. But in civil cases it is clear that both in that country and in England a new trial will be granted where, from the absence of proper instructions from the Judge, the Jury fall into an error. Formerly, the rule was that the mere commission of a crime did not render a witness incompetent, but persons convicted

of treason, felony, or certain other crimes, were rendered incompetent by conviction. The incompetency created by conviction was removed in England by Act of Parliament, and was subsequently removed here by Act XIX of 1837, by which it was enacted that no person shall, by reason of a conviction for an offence whatever, be incompetent to be a witness in any stage of a cause, civil or criminal, or before any Court in the territories of the East India Company.

It was contended, in the course of argument in the present case, that in India the rule of evidence in the Mofussil is different from the law of England with respect to the legality of convicting upon the uncorroborated evidence of an accomplice.

If there had been a long uniform course of decisions in the late Sudder Court that the uncorroborated evidence of an accomplice was insufficient in law for the conviction of a prisoner, we should have been disposed to bow to those decisions, and to act upon the rule "*stare decisis*."

One case only was cited in which Judge of the Sudder Court stated that he did not think it legal to convict upon such evidence. There may be other cases to the same effect. But there is no uniform current of decisions which would justify us in holding that the law in this respect in the Mofussil was different from the established law of England, and from that which was administered in the late Supreme Court, and is now administered by this Court in the exercise of Original Criminal Jurisdiction. It would require a uniform train of decisions to justify us in holding that the Law of Evidence to be administered by the Court upon such point as this is different in the exercise of the Appellate Criminal Jurisdiction from that which is acted upon in the exercise of Original Jurisdiction.

When called upon to give effect to particular expressions which have been made used by the Judges of the late Sudder Court with regard to the rules of evidence, we must bear in mind that, up to a very recent period when trial by Jury was established in certain districts, it was the province of the Session Judges, and of the Judges of the late Sudder Court, to determine questions of fact as well as questions of law in criminal cases, and that, in dealing with such cases, it was not very frequently necessary to determine whether the evidence of a particular witness was insufficient in law to justify

conviction, or merely insufficient to induce them, as judges of fact, to declare that a prisoner was guilty. There is a wide distinction, however, between disbelieving evidence and determining that it is not legally sufficient if believed; but this distinction is not always sufficiently adverted to by Courts which are judges of fact as well as of law.

Act II. of 1855, Section 28, was referred to by the appellant's pleader, by whom the case was very well argued, and it was contended that that Act rendered corroboration necessary. Upon that point, it is sufficient to say that it was not the intention of the Act to render inadmissible any evidence, which, but for the Act, would have been admissible (*see* Section 58); nor was it intended to lessen the legal effect of any such evidence.

We have, therefore, no hesitation in answering the first question in the affirmative, and declaring that a conviction may be legally had on the uncorroborated evidence of one or more accomplices.

It is unnecessary, as regards this part of the case, to answer the second question.

Holding that the Judge was not bound to direct the Jury that the evidence was not legally sufficient for a conviction, we shall probably mislead if we do not go on to consider whether there was any error or defect in the summing up which constitutes a valid ground of appeal. The question of misdirection is raised by the Judges who referred the case, and is, I think, substantially before us, and ought to be considered, although there is no specific question as to whether there was a misdirection or not. I proceed, therefore, to consider whether there is any ground for setting aside the conviction upon the ground of error in the summing up.

In the case of *Regina vs. Farler*, 8 Carrington and Payne's Reports, page 108, a very learned and eminent Judge, than whom no one was better able to deal with evidence, and to determine the degree of credibility to which particular witnesses were entitled—I mean the late Lord Abinger—in summing up the case to the Jury, made the following remarks: "I am strongly inclined to think that you will not consider the corroboration in this case sufficient. No one can hear the case without entertaining a suspicion of the prisoners' guilt; but the rules of law must be applied to all men alike. It is a practice, which deserves all the reverence of law, for Judges uniformly to tell Juries that they ought not to pay any respect to the testimony of an

"accomplice unless he is corroborated in some material circumstance. In my opinion, that corroboration ought to consist of some circumstance that affects the identity of the party accused.

"A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history without identifying the persons, that is really no corroboration at all. If a man were to break open a house and put a knife to your throat, and steal your property, it would be no corroboration of an accomplice that he had stated all the facts correctly—that he had described how the person did put a knife to your throat, and did steal the property. It would not at all tend to show that the party accused participated in it. Here you find that the prisoner and his accomplice are seen together at the house of the landlord. Now, look at his evidence. If they were seen together under circumstances that were extraordinary, and where the prisoner was not likely to be unless there were concert, it might be something. But he lives within one hundred and fifty yards, and there is nothing extraordinary in his being there; and he left when they were shutting up the house. Therefore it is perfectly natural that he should have been there, and left when he did. The single circumstance is, that the prisoner was seen in a house which he frequents, where he may be seen once or twice a week; and there the case ends against him. All the rest depends upon the evidence of the accomplice. The danger is that, when a man is fixed, and knows that his own guilt is detected, he may purchase impunity by falsely accusing others. I would suggest to you that the circumstances are too slight to justify you in acting on this evidence." The prisoner was accordingly acquitted.

In *Rex versus Wilkes and Edwards*, 7 Carrington and Payne's Reports, page 272, a similar rule was laid down by Baron Alderson in a case of sheep-stealing. He said: "There is a great difference between confirmations to the circumstances of the felony and those which apply to the individuals charged: the former only prove that the accomplice was present at the commission of the offence; the latter show that the prisoner was connected with it. This distinction ought always to be attended to." In summing up, the learned Judge said; "The confirmation of the ac-

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"complice as to the commission of the felony is really no confirmation at all, because it would be a confirmation as much if the accusation were against you and me. as it would be as to those prisoners who are now upon their trial. The confirmation which I always advise Juries to require is the confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged. You may legally convict on the evidence of an accomplice only if you can safely rely on his testimony; but I advise Juries never to act on the evidence of an accomplice, unless he is confirmed as to the particular person who is charged with the offence. With respect to the prisoner Edwards, it is proved that meat of a similar kind was found in his house. The meat cannot be identified, but it is similar; that is, therefore, some confirmation of the accomplice as to Edwards more than any one else. It is also proved that the skin was found in a whirley hole; that is no confirmation, because it does not affect the prisoners more than it affects any other person. With respect to the prisoner Wilkes, it is proved by the witness Meek that the prisoner Wilkes told him nearly the same story as the accomplice has told you to-day. If you believe that witness, there is confirmation of the accomplice as to the prisoner Wilkes: you will say whether, with these confirmations, you believe the accomplice or not. If you think that his evidence is not sufficiently confirmed as to one of the prisoners, you will acquit that one; if you think he is confirmed as to neither, you will acquit both; if you think he is confirmed as to both, you will find both guilty."

The Jury found both prisoners guilty.

In the case of *Rex vs. Stubbs*, in the Court of Criminal Appeal above referred to, Mr. Baron Parke said: "My practice has always been to tell the Jury not to convict the prisoner unless the evidence of the accomplice is confirmed, not only as to the circumstances of the crime, but also as to the person of the prisoner;" and Creswell, J., added: "You may take it for granted that the accomplice was at the committal of the offence, and may be corroborated as to the facts; but that has no tendency to shew that the parties accused were there." Chief Justice Jervis in the same case remarked: "There is another point to be noticed. When an accomplice speaks as to the guilt of three

"prisoners, and his testimony is confirmed as to two of them only, *it is proper, I think*, for the Judge to advise the Jury that it is not safe to act on his testimony as to the third person in respect of whom he is not confirmed, for the accomplice may speak truly as to all the facts of the case, and at the same time in his evidence substitute the third person for himself in his narrative of the case." In *Rex vs. Merries* and another, 7 Carrington and Payne's Reports, 270, on an indictment against *A* as principal and *B* as receiver, where the evidence of an accomplice was corroborated as to *A*, but not as to *B*, Baron Alderson thought it was not sufficient as to *B*.

Conflicting opinions have been expressed as to whether, in a case in which an accomplice accuses two persons, and is corroborated as to one, but not as to the other, a Jury ought to be advised to acquit the one as to whom there is no corroboration. The opinion expressed by Chief Justice Jervis in *Rex vs. Stubbs*, as above mentioned, appears to be the correct one; for nothing is more easy than for an accomplice to accuse an innocent person in order to get off his real companion in guilt, and to attribute to the person falsely accused acts which were really committed by the guilty companion.

In the present case, two accomplices gave evidence against Elahée Buksh; but that does not seem to carry the case much farther.

In *Rex vs. Noakes*, in which two accomplices spoke distinctly as to the prisoner, Littledale, J., told the Jury that, if their statements were the only evidence, he could not advise them to convict the prisoner; that it was not usual to convict on the evidence of one accomplice without confirmation; and that, in his opinion, it made no difference whether the evidence was that of one accomplice only, or of more than one. This, as a general rule, is correct, for otherwise two companions in guilt might get off by confessing and falsely accusing two innocent persons. But if two or three persons should be apprehended at different places, at long distances from each other, and should each confess and give a similar account as to the persons associated with them in a particular dacoity, the statement of each, if made under such circumstances as not to raise a presumption of collusion, might be proved in corroboration of his evidence; such statement being admissible as corroborative evidence under Act II. of 1855, Section 31. The evidence of the several accomplices so corroborated might be sufficient to satisfy a Jury, although the

evidence of one of them alone could not have been safely acted upon. These are matters to which the attention of a Jury ought, under all circumstances, to be specially directed, with proper remarks from the presiding Judge, according to the rule laid down by Mr. Justice Buller in the case already cited.

The danger of acting upon the evidence of an accomplice, who is admitted to give evidence for the Crown, arises, not merely from the fact of his having committed a crime—for that would go to the credit of every witness who had recently committed or been convicted of a crime—but from the fact of his giving his evidence under the hope or expectation of pardon, and of his obtaining immunity from punishment if his evidence be believed.

Suppose two gentlemen of previously undoubted honor and good character should, in a moment of irritation, not amounting in law to provocation, get out of a dāk carriage, and thrash the coachman or syce for not giving them a good horse—suppose the man should die, and that both should be convicted of culpable homicide. Would any one say that either of them would be so wholly unworthy of credit as witnesses in any other case, that a Jury ought to be advised not to act upon his testimony except so far as it was corroborated?

If he would not, after conviction, be unworthy of credit if called upon to give evidence against a stranger for another offence, why should he be unworthy of credit before conviction against his own companion and friend if compelled to give evidence against his will? Suppose that, immediately after the commission of the offence, one should be apprehended and the other should escape without being identified with sufficient certainty for conviction—suppose that the one who escaped should be apprehended and brought to trial, and that the one who had been apprehended in the first instance should be called as a witness against his will, and, being compelled to give evidence (as he might be under Act II. of 1855, Section 32), should identify his companion—would any Judge, in the exercise of a sound judicial discretion, feel himself bound to tell a Jury that, because the witness was an accomplice, it would be dangerous to act upon his evidence alone uncorroborated?

When the Judges speak of the danger of acting upon the uncorroborated evidence of accomplices, they refer to the evidence of accomplices who are admitted as evidence for

the Crown, in the hope or expectation of a pardon. Vol. V.

If, in such a case, the accomplices admitted to give evidence act fairly and openly, and discover the whole truth, though, according to the law of England, they are not, except in certain cases for which special provision is made by Statute, entitled as of right to pardon, yet the usage, the lenity, and the practice of the Court is to stop the prosecution against them, and they have an equitable title to a recommendation to the mercy of the Crown (Cowper's Reports 334).

The origin of the practice of admitting accomplices to give evidence for the Crown without approvement is explained by Lord Mansfield in *Rex vs. Rudd* (Cowper's Reports 334, 335). He there says:—

"A person desiring to be an approver must be one *indicted* for the offence, and *in custody* on that indictment. He must confess himself guilty of the offence, and *desire* to accuse his accomplices. He must likewise, upon oath, discover, not only the particular offence for which he is indicted, but all *treasons* and *felonies* which he *knows of*; and after all this, it is in the discretion of the Court whether they will assign him a Coroner, and admit him to be an approver or not; for, if on his confession it appears that he is a *principal*, and tempted the others, the Court may refuse and reject him as an approver. When he is admitted as such, it must appear that what he has discovered is true, and that he has discovered the *whole truth*. For this purpose, the Coroner puts his appeal into form; and when the prisoner returns into Court, he must repeat his appeal without any help from the Court or from any bystander. And the law is so nice that, if he vary in a *single circumstance*, the whole falls to the ground, and he is condemned to be hanged. If he fail in the color of a horse, or in circumstances of time, so rigorous is the law that he is condemned to be hanged; much more if he fails in essentials. The same consequences follow if he does not discover the *whole truth*; and in all these cases the approver is convicted on his own confession. (See this doctrine more at large in Hale's Pleas of the Crown, Vol. II., pages 226 to 236; Stauns. Pleas of the Crown, lib. 2, c. 52 to c. 58, 3 Insti. 129). A further rigorous circumstance is, that it is necessary to the approver's own safety that the Jury should believe him, for if the partners in his crime are not convicted, the approver himself is executed.

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"Great Inconvenience arose out of this practice of approvement. No doubt, if it was not absolutely necessary for the execution of the law against notorious offenders that accomplices would be received as witnesses, the practice is liable to many objections. And, though under this practice they are clearly competent witnesses, their single testimony alone is seldom of sufficient weight with a Jury to convict the offender, it being so strong a temptation to a man to commit perjury if by accusing another he can escape himself.

"Let us see what has come in the room of this practice of approvement—a kind of hope that accomplices who behave fairly, and disclose the whole truth, and bring others to justice, should themselves escape punishment, and be pardoned. This is in the nature of a recommendation to mercy. But no authority is given to a Justice of the Peace to pardon an offender, and to tell him he shall be a witness against others. The accomplice is not assured of his pardon, but he gives his evidence *in vinculis*, in custody; and it depends on the title he has from his behaviour whether he shall be pardoned or executed."

Sir Matthew Hale, speaking of approvement, says: "This course of admitting approvers has long been disused, and the truth is that more mischief hath come to good men by this kind of approvements by false accusations of desperate villains than benefit to the public by the discovery and convicting of the real offenders; jailors, for their own profits, often constraining prisoners to affect honest men, and therefore provision has been made against it." (*See Hale's Pleas of the Crown* 226.)

The modern practice of admitting accomplices to give evidence under a hope of pardon, though not so dangerous as the old practice of approvement, would still be attended with the greatest danger, but for the safeguard which has to some extent been provided by the practice of the Judges in recommending Juries not to act upon such evidence without requiring corroboration as to the identity of the person accused.

The danger of acting upon the uncorroborated evidence of accomplices is at least as great here as it would be in England, for here, as in England, the accomplices are not actually pardoned before they give evidence.

In England, by confessing and giving evidence, they acquire an equitable right to a recommendation for the mercy of the Crown. Here the Magistrate is merely authorized

to tender a pardon; and, if it appear to the Court of Session at the time of trial, or to the High Court as a Court of Reference, that the person who has accepted the offer of pardon has not conformed to the conditions under which the pardon was tendered, either by concealing anything essential, or by giving false evidence or information, it is competent to the Court to direct the commitment of such person for trial for the offence in respect of which the pardon was tendered.

The witness, therefore, does not give his evidence under an absolute certainty of immunity.

In Scotland the law is different. There, as remarked by Mr. Alison,

Alison's Practice of the Criminal Law of Scotland 453, cited by Mr. Roscoe, Digest of Evidence in Criminal Cases, 6th Edition, page 126. "it is established that, by the mere fact of calling the Socius as a witness, the prosecutor debarshimself from all right to molest him

for the future with relation to the same offence. This is always explained by the presiding Judge to the witness as soon as he appears, and consequently he gives his testimony under a feeling of absolute security as to the effect which it may have upon himself. This privilege is absolutely and altogether independent of the prevalence or unwillingness with which the witness may give his testimony. Justice may indeed be often defeated by a witness retracting his previous disclosures, or refusing to make any confession after he is put into the witness-box; but it would be much more put in hazard if the witness were sensible that his future safety depended on the extent to which he spoke against his associate at the bar."

It is quite as necessary here as it is in England, if not more so, that the evidence of accomplices should not be left to a Jury without such directions and observations from the Judge as the circumstances of the case may require.

The question is, whether the omission of the presiding Judge, on a trial in the Mofussil, to make such observations, is not such an error in his summing up as to justify the Court, on appeal or revision, in setting aside a verdict of guilty.

It has been said by a learned author, speaking of the administration of Civil Justice in England, that "it is

Code of Criminal Procedure, Sections 209, 211.

Starkie on Evidence, page 472.

"the practice for the Judge at Nisi Prius, not only to state to the Jury all the evidence that has been given, but to comment on its bearing and weight, and to state the legal rules upon the subject and their application to the particular case, and even to advise them as to the verdict they should give, so that it may accord with his view of the law and with justice."

He proceeds: "Indeed, without this assistance from the Judge, few Juries would, in a contested case, be able to come to an unanimous opinion, being frequently left in a state of great perplexity by the influence of the speeches of the contending leaders."

"The accuracy of the summing up of the Judge is therefore of the very utmost importance, because if the Jury, after hearing the evidence and the powerful arguments which probably have been urged in favor of quite opposite views of the question, were entirely left to decide for themselves, without an impartial direction as to what just and legal weight ought to be attached to this or to that view of the case, it would be difficult, if not impracticable, for them to come to a just conclusion: and hence, in the administration of civil justice, it is incumbent on the Judge correctly to state the law upon the case, as well as the evidence and the bearings of the latter."

If the above remarks as to the impracticability of Juries coming to a just conclusion are correct as regards the administration of civil justice in England, they are still more so as regards the administration of criminal justice in the Mofussil, where trial by Jury is in its infancy, and where the persons of whom Juries are generally composed are necessarily more dependent upon the Judge than they are in England for sound and proper advice and assistance as regards the degree of weight which may be fairly and safely attached to the testimony of particular witnesses. The Jury, it is true, are not legally bound to act upon the advice or recommendation of the Judge, as there is no appeal from a verdict of acquittal or from a verdict of guilty upon a mere matter of fact.

By Section 379 of the Code of Criminal Procedure, it is enacted that, in a trial by Jury, the Judge will sum up the evidence on both sides, and the Jury shall then deliver their finding upon the charge, and "a statement of the Judge's direction to the Jury

shall form part of the record." There can be no doubt that that Section requires the Judge to sum up properly, and there would be very great danger in holding that there is no remedy by appeal against a verdict of guilty, if it appears clearly to the High Court that a failure of justice has been caused by improper advice upon a question of fact, or by an omission to give that advice which a Judge, in the exercise of a sound judicial discretion, ought to give upon questions of fact, or as to the degree of credit to be given to particular witnesses.

It appears to me that it amounts to an error in law in the summing up, which, on appeal, is a ground for setting aside the verdict, subject, however, to the limitation provided by the Code of Criminal Procedure in Sections 439 and 426, viz., that the Appellate Court is satisfied that the accused person has been prejudiced by the error or defect, and that a failure of justice has been occasioned thereby.

It was said by Chief Justice Tindal, in *Davidson vs. Stanley*, 2 Manning and Granger's Reports, p. 728, that "it is no objection that a Judge lets the Jury know the impression which the evidence has made upon his own mind, and that, at all events, the party objecting to such a course should show that the impression entertained by the Judge was not justified by the evidence;" and it has been already shown that it is the practice of Judges in England to advise Juries not to convict merely upon the uncorroborated evidence of an accomplice.

If a Judge in a criminal trial in the Mofussil were to tell the Jury that in his opinion the evidence was sufficient to justify them in finding the prisoner guilty, in a case in which, if the Judge had been trying the case with the aid of Assessors, the High Court would, on appeal, have reversed his judgment if upon the same evidence he had convicted the prisoner, I have no doubt that the Court ought on appeal to set aside a verdict of guilty found by the Jury, notwithstanding the advice was merely as to the weight of evidence.

So, if a Judge, instead of advising a Jury not to convict upon the mere uncorroborated evidence of an accomplice, were to advise them to convict upon such evidence, or were to tell them that the uncorroborated evidence of an accomplice given under a tender of pardon was admissible, and that it was for them alone to form their opinion upon it, that a conviction founded upon such evi-

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Now, there are errors of omission as well as errors of commission, and I have no doubt that it would form a good ground of appeal against a verdict of guilty if a Judge were to call the attention of a Jury to all the evidence against the prisoner, and to omit altogether to allude or call attention to the evidence in his favor. By such a summing up, the Judge would not comply with the requirement of the Code of Procedure, and a verdict founded upon such a summing up ought, I think, to be set aside if the Court should be of opinion that the evidence was not sufficient to justify a conviction. I put the case merely to try the principle. It appears to me that such an omission, or an omission to follow a practice which is universally adopted by the Judges in England, and is described by Lord Abinger to be "a practice which deserves all the reverence of law," would be a ground of appeal against a conviction upon a verdict of guilty based upon such evidence alone, and founded by a Jury upon such a summing up. So also I think it would be error in a summing up if a Judge, after pointing out the danger of acting upon the uncorroborated evidence of an accomplice, were to tell the Jury that the evidence of the accomplice was corroborated by evidence of a fact which did not amount to any corroboration at all. When Lord Ellenborough said, "Judges in their discretion will advise a Jury not to believe the evidence of an accomplice unless he is confirmed, or only so far as he is confirmed," he must have intended that it was their duty to do so. "Discretion," says Lord Mansfield, "when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour. It must not be arbitrary, vague, and fanciful, but legal and regular."

But, although I am of opinion that the Legislature intended that the Sudder Court should have the power of setting aside a verdict of guilty pronounced by a Jury upon an erroneous or defective summing up of the evidence by the presiding Judge, yet I think that it was not their intention that a verdict of guilty should be set aside in every case in which there is a defective or erroneous summing up. It was their intention to provide protection for the in-

nocent, but not chances of escape for the guilty. The power, therefore, of reversing a finding or of setting aside a trial was carefully guarded by Sections 426 and 439 of the Code of Criminal Procedure, by which it was enacted that "no finding or sentence passed by a Court of competent jurisdiction shall be reversed or altered, on appeal or revision, on account of any error or defect either in the charge or in the proceedings on the trial, unless in the judgment of the Appellate Court the accused person *shall have been prejudiced* by such error or defect;" and that "no trial held in any Criminal Court shall be set aside, and no judgment passed by any Criminal Court shall be reversed, either on appeal or otherwise, for any irregularity in the proceedings of the trial, unless such irregularity have occasioned a failure of justice."

The Code of Criminal Procedure provides that, if a person be convicted on a trial by Jury, the appeal shall be admissible only upon a matter of law. But it certainly is not against the principle, or even the letter of the Code, that the Court should have power to set aside a verdict of guilty for an insufficient or defective summing up of the evidence in a case in which, in their judgment, the verdict is not warranted by the evidence.

If a verdict and conviction could not under such circumstances be set aside, trial by Jury in the Courts of Session in this country would be fraught with the most dangerous consequences. On the other hand, if every convict, against whom a verdict of guilty is pronounced by a Jury, has a right to have that verdict set aside upon appeal, and to obtain his discharge whenever it can be shown that the presiding Judge has not properly directed the Jury as to the degree of weight which ought to be given to particular evidence, a wide door would be thrown open for the escape of guilty men, and the due administration of the criminal law of this country would be placed in the greatest jeopardy in those districts to which trial by Jury has been extended. A verdict of acquittal by a Jury cannot be reversed, and ample protection is afforded to prisoners by allowing the High Court to reverse a verdict of guilty for any error or defect in the summing up, whenever the Court is of opinion that a failure of justice has been thereby occasioned.

It has been suggested that the word "reverse" means to change to the contrary,

and that to reverse a verdict of guilty is to change it into a verdict of not guilty; and that, although the Court, as a Court of Revision, may grant a new trial, as a Court of Appeal it has not power to do so.

But I am of opinion that the word "reverse" is not used in so restricted a sense. The word "reverse" in Sections 419 and 426 is applicable not merely to findings or verdicts, but also to sentences; and in Section 439 the same word is used with reference to judgments only. But if the word "reverse," when applied to a verdict, means to "change or turn into the contrary," it must also mean the same when applied to judgments or sentences. Thus, a judgment of conviction must be turned into a judgment of acquittal. Section 420 shows that such was not the meaning of the word when applied to sentences, even if without that Section it would have been possible to put such a construction upon it.

The Court, upon revision, may grant a new trial. But the person

Section 405. convicted cannot obtain a revision as a matter of right.

I think that the Court has as great a power in this respect on appeal as it has on revision, and that it may set aside a verdict of guilty and a conviction founded upon it for any error in law, such as a misdirection of the Judge in point of law, or an error or defect in the summing up of the evidence, or the improper rejection or admission of evidence, provided the Court is of opinion that the person convicted has been prejudiced by the error or defect, and that a failure of justice has been occasioned thereby. I am of opinion that the word "reverse" is used in its legal sense, and means to make void, to set aside, or annul.

The Legislature, when giving a power to a Court of Revision to order a new trial, may have thought it necessary to do so by express words, as a Court of Revision may act of its own motion and without any application or consent of the person convicted. But an appeal must be preferred by the person convicted, and it seems to follow that, if he asks to have a finding and conviction set aside for error in law, he cannot set up that conviction in bar of a second trial.

That was the principle acted upon by the Judges in America, who held that a new trial might be granted in cases of felony notwithstanding the words in the constitution, "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb," which words were

interpreted by Mr. Justice Story to mean that "no person shall be tried a second time for the same offence where a verdict has been given by a Jury." "I am aware," said Mr. Justice Kane, "that one of the most eminent of our Jurists, Mr. Justice Story, has found an inhibition in the constitution against the grant of new trials in cases involving jeopardy of life. But I cannot realize the correctness of the interpretation which, anxious to secure a citizen against the injustice of a second conviction, requires him to suffer under the injustice of the first. Certainly I would not subject the prisoner to a second trial without his consent. If, being capitally convicted, he elects to undergo the sentence, it may be his right. When, however, he asks a second trial, it is to release himself from the jeopardy in which he is already, and it is no new jeopardy that he encounters when his prayer is granted, but the same divested of the imminent certainty of its fatal issue."

The same distinction was noticed by other Judges between jeopardy incurred with the consent of a prisoner, and jeopardy incurred without that consent.

If a new trial may be granted for error in law by a Court of Revision, even without the prisoner's consent, can it be doubted that the same Court, as a Court of Appeal, may grant a new trial when an appeal is preferred by a prisoner against a verdict and conviction?

It appears to me that, in all cases in which a finding of guilty is set aside upon appeal, the Court, if it considers it necessary, may order a new trial.

In some cases it may be necessary; for example, where evidence is improperly rejected, or where, for other reasons, the Appellate Court is unable to form a correct opinion as to the guilt or innocence of the appellants. But when the finding and conviction are objected to upon the ground that the Judge did not properly direct the Jury as to the degree of weight which ought to be given to the evidence, it appears to me that this Court, sitting as an Appellate Court, is not necessarily bound to send the case back for a new trial. If the Court are of opinion that the evidence could not, in any proper view of the case, support a conviction, it would be worse than useless to send the case back for a new trial in order that a Jury might have the opportunity of convicting upon such evidence under a proper summing up.

Vol. V. Section 419 of the Code of Criminal Procedure allows the Appellate Court to alter or reverse the finding. It does not compel them to send the case back for a new trial in cases in which they see that it is useless, and may be injurious to do so. Regard for the prosecutor and witnesses forbids it; the prisoner is amply protected by the Section which prohibits an appeal from a judgment of acquittal, and a failure of justice is sufficiently guarded against by allowing the Court to order a new trial whenever, upon appeal, they are satisfied that there has been a failure of justice. It would tend to defeat, and not to promote, justice, if a verdict of guilty were set aside, and a new trial granted, for a defective summing up with reference to the weight of evidence in a case in which the High Court would, upon the evidence given on the trial, have affirmed a conviction, if, instead of a trial by Jury, the trial had been before a Judge and Assessors. In determining whether the verdict ought to be set aside, and a new trial granted for a defective summing up of the evidence, it appears to me that the question to be considered is not whether, upon a proper summing up of the whole evidence, a Jury might possibly give a different verdict, but whether the legitimate effect of the evidence would require a different verdict. If the evidence is such that the High Court would have affirmed the conviction if the trial had been before a Judge and Assessors, I think that they ought not to set aside a verdict of guilty found by a Jury merely because the Judge has not, in summing up, given proper caution or advice to the Jury as to the weight which they might properly give to the evidence. If the verdict is set aside for such a cause upon the ground that the error of the Judge has caused a failure of justice, and that the prisoner has been prejudiced thereby, it may be necessary in some cases to grant a new trial. But if the Court is satisfied that a failure of justice has been caused, and that the evidence is wholly insufficient to support any conviction against the prisoner, and would, upon the same evidence, have reversed a conviction, if the case had been tried without the intervention of a Jury, there is no necessity, and I think it would be improper, to grant a new trial. In such a case, the Court, having set aside the verdict, may order the prisoner to be discharged.

In the case under consideration, the appellant was convicted and sentenced for the crime of dacoity. The Judge told the Jury

that the prisoners might be divided into four classes: *1st*, Elahee Buksh (the appellant), Pauchcowree, and Baratee, charged with abetment, and against the first and last of whom the tendency of the evidence is to show that the dacoity originated with them; *2nd*, the Ghazeepore men, who came down to commit the dacoity. As to these, he says: "The second set, the Gazeepore men, are charged with actually committing the dacoity, and the evidence goes to shew that Chukowree Goindah, Bahadoor Goindah, and Elahee Buksh (the appellant), also went with the gang."

The statements "that the tendency of the evidence was to show that the dacoity originated with" Elahee Buksh, the appellant, and others, and that the evidence went to show that Elahee Buksh went with the gang who were charged with the actual commission of the dacoity," would fairly lead to the inference that the evidence was such upon which Elahee Buksh might be safely convicted of dacoity and also of abetment of dacoity, and the Jury found him guilty of those offences. So far from cautioning the Jury against convicting the appellant upon the mere evidence of accomplices, unless they should find it corroborated as it related to him, he substantially told them that the evidence went to show that the appellant was guilty.

Having made the remarks to which I have before alluded, the Sessions Judge concluded by saying: "Elahee Buksh's statement has been already recapitulated: his defence is that the charge was made against him out of spite, because he was the person through whom the dacoity was traced out. This is undoubtedly true. It is for you to say whether the confessing Goindahs (*i. e.*, the accomplices) are really speaking the truth in implicating Elahee Buksh, or whether this was done out of revenge."

The Judge did not even tell the Jury that the accomplices were giving their evidence under a tender of pardon, or explain to them the position in which the witnesses were placed, and the danger of acting upon their evidence, unless they should find that it was corroborated. The witnesses were men whose evidence was of a dangerous character. They were not merely accomplices giving evidence under a tender of pardon; they were men who had been previously convicted of dacoity, and had been pardoned for the purpose of giving evidence against other dacoits, and were kept in the pay of Government under the surveillance of the police.

Even then, according to their own evidence, they were planning and concocting fresh dacoities, and, having evaded the surveillance under which they were kept, abetted the dacoity in question; and then again, for the sake of saving themselves, turned round and accused others of being their associates in the new crime. Yet the attention of the Jury was not prominently directed to the fact, as it ought to have been, by the Judge in his summing up, nor did he point out to them the danger of acting upon the uncorroborated evidence of accomplices in general, or of such desperate and abandoned characters as Shunker and Soondur in particular.

I have read the evidence in the present case, and I agree with the Judges of the Division Bench by whom this case was referred, that the evidence of the accomplices was not corroborated by the Telee, who deposed that he sold 2½ seers of oil to Pauchcowree, the servant of Elahee Buksh, the prisoner. The circumstance was not an unusual one, nor was it more unnatural than the fact commented upon by Lord Abinger in *Regina vs. Farler*, above cited, that the accomplice and the prisoner were drinking together at a public house commonly frequented by the prisoner, and that they left together on the night in question when the house was shut up.

But there was in this case, as it appears to me, a strong piece of corroborative circumstantial evidence against the prisoner Elahee Buksh. Isree Singh, Inspector of Police, Bankipore, stated that he got information on the 18th September at 11 P. M. from Elahee Buksh, the prisoner, that a dacoity at Alungunge had been committed by the approvers and *some Shahabad and Ghazee-pore dacoits, and that some of the property was with the approvers*, and some had been sold to Ramsahaye Sonar, who was about to melt it down, and he suggested the propriety of an instant search.

The witness was not cross-examined by Elahee Buksh, nor does the fact of his having stated to the witness that *some Shahabad and Ghazee-pore dacoits* were parties to the dacoity at a time when, if his story is correct, his knowledge of the fact is not accounted for or explained, seem to have been pressed or used as evidence against him. The evidence of the Inspector is, therefore, the more worthy of credit.

If Elahee Buksh's story is true, and he was not a party to, or an abettor of, the dacoity, how did he know that some Ghazee-pore dacoits were parties to it, or that some of

the property remained with the Goindahs? The offence was committed on Saturday night, and Elahee Buksh's statement, if the evidence of the Inspector is accurate and to be believed, was made on Monday night at 11 P. M., before any search had been made, or the police had had any communication with the Goindahs.

Elahee Buksh in his defence stated that he made secret enquiries which led to the belief that the property had been sold to Ramsahaye Sonar, but no evidence was given on his behalf to show from whom he made the enquiries, or how, at the time when he gave information to the police, he knew that part of the property was with the Goindahs, or that some Ghazee-pore dacoits had been concerned in the robbery.

The witness Nuseebun, who was admitted to give evidence under a tender of pardon, was not an accomplice in the dacoity. She appears to have received a portion of the property knowing it to have been obtained by dacoity. But she lived with Soondur Goindah as his wife, and was probably as untrustworthy as if she had actually been his wife, or as an actual accomplice in the dacoity. She says that Elahee Buksh came on the Sunday to divide the stolen property, and that he brought the scales. In this respect, if true, she corroborates Soondur and Sunker. It appears that the Goindahs were arrested and taken to the Quarter-guard before any of the accomplices confessed, and that the women were taken to the Thannah. If, after the arrest, and before the confession, Nuseebun had no means of communicating with Sunker or Soondur, or of hearing their confession before she was examined and gave her evidence, the fact of her corroborating the evidence of the other accomplices without knowing what they stated, and without communication with them, is a strong fact to be taken into consideration. I do not think that there is much weight in the fact that the accomplices did not mention Elahee Buksh's name at first. They did not confess when they were first arrested; as soon as they confessed, they implicated Elahee Buksh.

The case should be returned to the Division Bench with an expression of the opinion of the Full Bench—

1. That a conviction founded upon the uncorroborated evidence of one or more accomplice or accomplices alone is valid in law.

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2. That, for the reasons above stated, there was error in law in the summing up of the evidence, which would warrant the Court in setting aside the verdict of guilty if the Court is satisfied that the prisoner was prejudiced by the error, and that there has been a failure of justice.

3. That the verdict and conviction ought not to be set aside if the Court be of opinion that the verdict was warranted by the evidence, and that upon that evidence they would have upheld the conviction on appeal if the trial had been by the Judge with the aid of Assessors, instead of by Jury.

I should observe that, in his evidence before the Magistrate, the Inspector of Police, Isree Singh, did not say that Elahee Buksh, the appellant, informed him that some Ghazee pore men were concerned in the dacoity. Nor did the woman Nuseebun mention the fact of Elahee Buksh's bringing the scales. It may be that the Judges, who referred this case, if they set aside the conviction, may consider a new trial necessary to test, by further examination, the accuracy of that portion of the evidence to which I have referred, and which, if accurate, tends to corroborate the evidence of the accomplices against the appellant.

Whatever may be the result of this case, it appears to me that a copy of the depositions ought to be sent to the Lieutenant-Governor of Bengal. The accomplices who gave evidence are convicted dacoits in the pay of Government. These men and the other Goindahs who were convicted, though supposed to be under proper surveillance, were, according to the evidence of the accomplices, engaged in abetting and planning fresh dacoities. To keep a number of such men together in the pay of Government appears to me to be most dangerous, even when they are under the strictest surveillance: but to leave them under such a lax inspection as that which appears to have been exercised in the present case seems to be little short of keeping up, at the public expense, a nest of dacoits, a harbour for men of the most abandoned, depraved, and dangerous character, and a place for the reception of stolen property.

It appears to me that the attention of his Honor the Lieutenant-Governor should be called to the lax and insufficient manner in which the surveillance appears to have been performed by those who were entrusted with the duty.

Selon-Karr, J.—I have previously read the exposition of the law by the learned Chief Justice with that attention which its full and exhaustive nature merits.

There appears, from this and from other cases, to have existed some slight doubts amongst us as to how the evidence of an accomplice or of two accomplices should be treated, and as to whether a conviction is legal and ought to be affirmed, if founded on such evidence alone and uncorroborated. I have now, after full consideration, arrived, substantially, at most of the same conclusions as the Chief Justice. I may observe, however, that, on such questions, we do quite right to search for information, guidance, and aid in the decisions of the highest judicial authorities in England, as well as in American law-books. But, as was remarked by Mr. Justice Campbell in a late case, I may take the liberty of doubting whether the *dicta* of English Law, or even the most elaborate English decisions, are imperatively to rule us on *all* points in the discharge of the Appellate Criminal Jurisdiction of this High Court. It is almost superfluous to observe that we deal here with a state of society very different from any European society, and we must apply the law either of particular Statutes, or that which is best suited to the people. We are not necessarily to be guided by English Law on all points. The substantive criminal law of the Penal Code is unquestionably different from English criminal law. On the other hand, I would observe that the utmost that the old Sudder decisions establish, is, to my thinking, that it was a rule of practice rather than an established rule of law with Sudder Judges not to convict on the uncorroborated testimony of accomplices. In this country such a rule may, practically, in many cases, be a sound rule, though it is easy to conceive some cases in which there could be no reason why a conviction should not ensue on the uncorroborated evidence of an accomplice. I think it unnecessary, after the citation of so many high authorities by the Chief Justice, after his full statement of the particular case before us, and after his general remarks, with many of which I entirely agree, to do more than state my own conclusions. I trust that the law on this important subject may henceforth be, in a great measure, settled. Some of the cases quoted, especially that in which Lord Abinger delivered judgment, were referred to by me on a very recent occasion.

The consideration then which I have

given to this subject, has enabled me to arrive at the following conclusions :—

1. A conviction upon the uncorroborated evidence of an accomplice is legal ; and failure in corroboration of the same is not a ground for refusing to convict or for reversal of conviction.

2. Judges, for all that, ought to be most careful in this country to direct Juries that the evidence of accomplices should be received with caution, and that, if possible, corroboration should be required. The extent of such corroboration should be matter for the Jury. In cases tried by Assessors and open to appeal on the facts, the Judge should himself, I think, act on the same principle.

3. A new trial can be granted, if necessary, by a Bench of the High Court sitting as well in appeal as on revision. In a late case, Mr. Justice Kemp and myself, in this view, ordered a new trial on an appeal from a conviction by a Jury.

4. In the case now referred to us, the failure of the Judge to direct the particular attention of the Jury to the nature of the evidence of the accomplices, did amount to an error in law ; and the Divisional Bench may deal with the case accordingly.

5. Convictions ought not to be reversed, nor should new trials be granted, unless the accused has been really prejudiced within the meaning and scope of Section 426 of the Code of Criminal Procedure.

Jackson, J.—Upon the pure legal point before us, I agree in the conclusions at which the Chief Justice has arrived, and generally in the reasons which he has stated.

I think it must be admitted that a conviction by a Jury upon the uncorroborated testimony of an accomplice is good in law—

1st. Because the accomplice is a competent witness even though he may have been previously convicted of an offence (Act XIX. of 1837) ; and because (Act II. of 1855, Section 28) a single witness (if entitled to full credit) is sufficient (except in cases of treason) to prove any fact, unless there be a rule or practice in our Courts that requires corroborative evidence in support of his testimony.

2nd. Because cases are conceivable in which the accomplice would be thoroughly credible.

3rd. Because there is no such established rule or practice as is referred to in the latter part of the Section just cited.

There can be no doubt that the Chief Justice has indicated how it is that we have no such rule. This came about, *first*, be-

cause for many years exclusively, and until quite recent times in a large proportion of cases, the procedure in criminal trials was governed by Mahomedan Law, and the rules taken from that law and applied to particular cases were never accurately defined and laid down for general adoption. *Second*, because the finality of the verdict of a Jury has only arisen under the Code of Criminal Procedure ; and the Judges of the late Sudder Court or Nizamut Adawlut, being supreme Judges of fact as well as of law in criminal trials, were not under the necessity of discriminating between what was legally insufficient and what their judgment refused to accept.

This being so, in the vacancy, as it were, of any rule upon the subject, we ought probably to adopt, on the Appellate Side of this Court, the same principles of evidence which are recognized in the exercise of Original Jurisdiction. At any rate, we are not at liberty to adopt any principle of exclusion which is not admitted there, and has not the sanction of ancient practice in the late Nizamut Adawlut. And thus, although I should fully adhere, as a Judge of fact, to the principle which I stated in the case of Dwarka (who was tried by a Judge with Assessors), and which in that case had the concurrence of my learned brothers Kemp and Seton-Karr (5 Weekly Reporter, page 18), yet, as matter of law, I am bound to say that a conviction by a Jury founded upon the evidence of an accomplice without corroboration is not invalid.

But, before the Jury can deliver any finding upon a charge, they must have the evidence on both sides summed up to them by the Judge, and this function, also called his "direction to the Jury" (Section 379, Code of Criminal Procedure), must be fully, discreetly, and conscientiously performed. A statement of the direction is to form part of the record, and a report of it forms part of the matter for this Court's consideration when it acts as a Court of Revision.

There can be no doubt but that an erroneous direction to the Jury (where such direction has caused a failure of justice) is a ground for setting aside the verdict, and for either discharging the prisoner or ordering a new trial as the circumstances of the case may require. And I am not acquainted with any kind of error which is more important in criminal trials than a direction which misleads or omits to guide the Jury as to the nature or the weight of evidence.

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I think it immaterial, for the purposes of the present decision, whether the word "reverse" in the 419th and 420th Sections of the Criminal Procedure Code means simply to "turn to the contrary" as in the natural sense, or to "make void," which is no doubt a legal interpretation, as convictions before a Jury can only come up in appeal to this Court, as this Court under its powers of revision can order a new trial, and can exert those powers upon hearing an appeal as well as on other occasions.

Upon the duty of a Judge in summing up, I need not add anything to what has been said by the Chief Justice.

But upon the necessity for that duty being carefully performed, and upon the special danger of relying on approvers' testimony in this country, I think it right to say that which my official experience has suggested.

It is not too much to say that Native Juries in the Mofussil are generally quite incapable of appreciating evidence, unaided, when the question before them is at all critical. On the one hand, they readily, and even greedily, listen to positive assertions regarding the guilt or innocence of the prisoner, frequently without discriminating between that which the witness declares of his own knowledge, and that which is pure hearsay. On the other hand, they commonly disregard circumstantial evidence, though it be of the strongest and most trustworthy character. And though it may come out in cross-examination that the statement is hearsay, though it may even be apparent at once, and the words might be taken down, yet they have been heard by the Jury, and the impression is made. And though the facts which constitute circumstantial evidence be well put together, and their effect be obvious to the trained judicial mind, they will seem of little importance to the ignorant Juror.

With these proclivities, the Native Juror plainly stands in need of intelligent guidance, and, without that guidance, will, in difficult cases, often go entirely wrong. It is remarkable, too, as it is notorious, that the Jurors are, as a rule, decidedly less intelligent, as well as less instructed, than the persons employed as Assessors in criminal trials; and yet, by a strange anomaly of modern law, the verdict of the ignorant, inexperienced, unsworn Jury is final upon facts; while, upon facts, not only are the Assessors over-ruled by the Judge, but the

opinion of Judge and Assessors together may be set aside by the Appellate Court.

And then as to testimony, I feel bound to say, after many years of converse with Courts of Justice in India, that veracity is not regarded in this country as it is in the countries of Western Europe. Whether this be due to wilful falsehood, to imperfect memory, to inexact conditions of mind, to fear, or to all these causes combined, I am not called upon at present to enquire. I need only say that the care with which witnesses must be watched, and the deductions which have to be made from their credit, are much greater than in England.

It must in fairness be remembered that, as witnesses, we have to do, almost universally, with the meaner classes; that the respectable Native avoids being made a witness as we should shun the small-pox; and that witnesses, therefore, are scarcely a fair sample of the population.

But the fact remains; and when the witness is, moreover, a person stained, by his own confession, with the commission of atrocious crimes—most of all, when, to the desperate ruffianism of the dacoit, he adds the depravity of the retained approver—can the unsupported word of such a person be a safe ground on which to convict any prisoner?

I need not say that this (and not the unlucky gentleman who in a moment of irritation has committed an act of violence) is the kind of approver or accomplice whom we have in view when we speak of approver's testimony. The other case is of extremely rare occurrence—this of every day.

Now, when, in the course of a long trial, in which many persons are on their defence, there is against particular prisoners only the kind of evidence we are speaking of, and the Judge, in his direction, instead of pointing out the defect, and warning the Jury against the danger, actually throws a veil over that nakedness, and disguises the danger by the use of general words to the effect that "the tendency of the evidence is to establish the prisoner's guilt"—in such a case, can it be doubted that the Judge has greatly miscarried, that the Jury have been wrongly directed, and that the prisoner has been seriously prejudiced? I think not, and I am sure that the nature of both witness and Juror, the finality of and absence of sanction to the verdict, make it even more incumbent on the Judge in this country than it is in England, to perform with care and fidelity the office of direction,

I have heard it said that, if the Jury go wrong, it does not very greatly matter—the prisoner can be pardoned. No doubt he can, and there may be persons so constituted as to find this a satisfactory assurance. It is not so to me. No doubt, after an improper conviction has taken place—when the matter can be properly represented through the proper channel—when the head of the Government can be communicated with at Darjeeling or at Simla—the convict may, after weeks or months of unmerited suffering, receive a free pardon for an offence of which he ought never to have been found guilty. For my part, I should prefer to be delivered by a careful and regular administration of justice.

My Lord has pointed out that the prisoner is not in every case of misdirection entitled to a new trial, and there has been some apprehension expressed that the admission of the principle we are laying down may open a door to the escape of criminals merely by reason of some shortcoming of the Judge in point of form. But it seems to me that the simple test, "has there been a failure of justice?" may be applied in most cases with perfect ease and perfect safety.

In regard to the proposed rule that we should not interfere in case of misdirection where the facts are such that, if the trial had been held before a Judge and Assessors, we should have affirmed the sentence, I have only one misgiving. It is not always safe—I might say it is rarely safe—for an Appellate Court, with papers before it, to put itself in the place of the Court below which has heard the witnesses; and it might be that, in affirming the conviction on the faith of some unnoticed circumstance of corroboration found in the evidence, we might be using that which the Judge and Jury would not have relied upon. But this perhaps only suggests caution in the application of the rule, rather than an objection to the rule itself.

With these observations, therefore, I concur both in the judgment on the general point, and in the course which it is proposed to take with the particular case before us.

The 28th May 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover,
Judges.

Robbery.

Queen versus Teekai Bheer.

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of robbery.

Held that the offence was robbery where, in committing theft, there was indubitably an intention, seconded by an attempt, to cause hurt.

We think that the prisoner has been rightly convicted. That the woman's nose was not torn, was an accident; the clasp of the *nuth* came loose, and so the cartilage escaped, though pain was caused, and blood flowed. But there was indubitably an intention, seconded by an attempt on the part of the prisoner, to cause hurt; and the offence was, therefore, robbery.

But the punishment awarded by the Sessions Judge appears to us too severe.

The prisoner is not shewn to be a bad character, or to have been previously convicted, and a sentence of seven years' transportation is altogether disproportionate to the offence committed.

We are extremely unwilling, as a general rule, to interfere with the exercise of the Judge's discretion in the matter of punishment within the limits prescribed by the law, but, in this case, the punishment awarded appears to us so far beyond what is required, that we feel called upon to interfere; and, accordingly, we alter the sentence to one of two years' rigorous imprisonment.

The Sessions Judge ought to have forwarded the appeal with less delay.

The 28th May 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

False Evidence.

Queen versus Rewah Goallah.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of false evidence.

A false statement by a witness, as to his position or character, ought not to be punished so severely as a false charge on a false claim.

In this case, the prisoner has been convicted, by Mr. Ainslie, the Judge of Patna, sitting with a jury, of the offence of

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The facts, stated briefly, appear to be as follows :

Bhutton Goallah and Wullee Goallah charged the servants of Toondun Sing, their zemindar, with carrying off some buffaloes belonging to them, the alleged object being to compel them to supply *ghee* to the zemindar at a low price. Rewah Goallah appeared as a witness in support of the charge, and, for the purpose apparently of causing additional weight to be attached to his evidence, stated that he was *not* the brother of Bhutton Goallah. This statement was proved to be false, and admitted to be so by prisoner himself.

We think that a false statement by a witness as to his position or character ought not to be punished so severely as a false charge on a false claim.

There is no proof of the falsehood of the main story of the prisoner, *viz.*, that he saw Toondun's servants driving off the buffaloes.

We cannot assume that it is false. The offence actually established *viz.*, the giving of false evidence which simply affects the witness's credibility being of a comparatively venial character, we think it would be sufficiently punished by 12 months' imprisonment ; and we therefore mitigate the sentence of the Sessions Judge accordingly.

The 28th May 1866.

Present :

The Hon'ble J. P. Norman and
G. Campbell, *Judges*.

Using forged document.

Queen *versus* Prosunno Bose and two
others.

*Committed by the Magistrate, and tried by
the Sessions Judge of Rudea, on a*

charge of fraudulently using as genuine a forged document, &c.

A conviction may be had for using as genuine a forged document purporting to be made by a public servant in his official capacity, notwithstanding the illegibility of the seal and signature thereon.

In this case the prisoner, Prosunno Bose, has been found guilty of using a forged document purporting to be made by a public servant in his official capacity.

It appears that certain cattle, belonging to the prosecutor, had been sold under a decree obtained against him by the prisoner Koylas Bose. The cattle was bought by prisoner Moothoornath Bose. It was subsequently arranged that they should remain in the charge of one Soottan Biswas, and that the money due under the decree should be paid, and, if the money was paid within one month, the cattle should be returned.

The prosecutor, Mudaree Mundul, alleges that he did repay the money. After the expiration of one month, the prisoner Prosunno Bose went to Soottan Biswas, and produced to him a document purporting to be an order to Futeh Ali, constable, informing him that, according to the order of the Huzoor, he was to go to the spot, and see that the cows were returned to Moothoornath Bose. This order was sealed with a seal of which the Sessions Judge observes that it does not correspond with any known official seal, and on it was a scrawl, by way of signature, apparently an attempt to imitate the appearance of English writing, but perfectly illegible.

The Sessions Judge left the question to the Jury, and the Jury found that the prisoner Prosunno Bose used that document *purporting* to be a forged document made by a public servant in his official capacity.

We think it clear that there was evidence to go to the Jury upon that point, and that they were warranted in finding that this document, notwithstanding the illegibility of the seal and signature, purported, or, in other words, appeared on the face of it, to have come from a superior officer to a public servant, such superior officer being necessarily a public servant, and, therefore, that a conviction under Sections 466-471 of the Penal Code was proper.

The other two prisoners appear also to have been properly convicted of abetting the offence, and we therefore reject this appeal.

The 28th May 1866.

Present.

The Hon'ble J. P. Norman and G. Campbell,
Judges.

**Hurt—Culpable Homicide not amounting
to Murder.**

Queen versus Panchanun Tantee.

*Committed by the Magistrate, and tried by
the Officiating Sessions Judge of Midna-
pore, on a charge of culpable homicide
not amounting to murder.*

The prisoner, having received great provocation from his wife, pushed her with both arms so as to throw her with violence to the ground, and, after she was down, slapped her with his open hand. The woman died, and on examination it appeared that there were no external marks of violence on the body, but that there was a certain degree of disease of the spleen, and that death was caused by the rupture of the spleen. Held, under the circumstances, that the prisoner was guilty of causing hurt, and not of culpable homicide not amounting to murder.

Campbell, J.—It appears from the finding of the Sessions Judge that the prisoner in this case, having been subject to extreme provocation by his wife, pushed her with both his arms so as to throw her with violence to the ground, and, after she was down, slapped her with his open hand.

The woman died, and, on examination, it was proved that there was a certain degree of disease of the spleen, and that death was caused by the rupture of the spleen. It appears from the medical evidence that there were no external marks of violence whatever. The deceased, it appears, was, for the most part, a healthy woman, and the disease of the spleen had not proceeded far; it was, in fact, an early stage of disease. Under these circumstances, the question on which the case turns is simply this: Did, or did not, the prisoner act with the knowledge that, by his act, he was likely to cause the death of the deceased? And that would, it seems to me, depend on this, whether the prisoner did, or did not, know that the deceased was labouring under such a disease that a blow, or such violence as is used in throwing a person violently upon the ground, would be likely to cause death? If the prisoner did not know that there existed disease of such a nature that moderate violence was likely to cause death, and the violence inflicted was not such as would cause death to a person in an ordinary sound state of health, the offence is not

culpable homicide. The illustration (b) attached to Section 300 of the Penal Code seems to be, in this instance, exactly in point. For, although the illustration is used to show what is murder and what is not murder, it may very well stand for the purposes of this case, without going into minor details, that a case such as (not coming under the exception) is set forth in this illustration (b) for the purpose of showing what is murder and what is not murder, would equally, in a case of culpable homicide (qualified by an exception taking it out of the category of murder), shew what is culpable homicide and what is not culpable homicide. In this case the Sessions Judge says: "Where a man in ungoverned rage throws a woman with all the force of both his arms upon the hard ground, it cannot but be presumed, this Court is of opinion that the man has acted with the knowledge that he was likely by his act to cause death." This, I think, is putting the matter far too broadly. It cannot be said that in every case the mere throwing upon the ground a strong healthy woman would be likely to cause death. Some excessive violence must be shewn to have been used, and in this case the medical evidence proving the absence of all external marks of violence shews that, in truth, no extreme violence, beyond the violent push, was used. On the other hand, the evidence does not shew whether the prisoner did know of the diseased state of his wife's spleen; on the contrary, the evidence of the Civil Surgeon, proving that the disease was in an inchoate state, and the woman, generally speaking, strong and healthy, would go to shew that the prisoner probably had no such knowledge. I think, therefore, that there are reasonable doubts as respects the charge of culpable homicide, of which the prisoner must have the benefit, and that he is, in fact, guilty of hurt only. I do not think it necessary to order a new trial, and the justice of the case will be met by a sentence of one year's rigorous imprisonment. I would mitigate the sentence of the Sessions Judge accordingly.

Norman, J.—I concur in the result arrived at by my learned colleague in this case. Without going minutely into questions of law, I desire to say a few words as to the grounds of my opinion.

The prisoner, who had received provocation of a most gross character from his wife, threw her down, sat upon her, and slapped her. He was found by a neighbour sitting

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upon the woman. Immediately after he was drawn away from her, he gave her water, supported her head, and tried to relieve her. The wife died from rupture of the spleen. The disease was not of long standing, and had not apparently affected her general health, and was, in all probability, not known to the prisoner. There were no marks of violence on the body found on examination by the Civil Surgeon. The Civil Surgeon says "that, looking to the weight of the deceased, if, in falling from a mere standing position on to the floor, there was anything prominent against which her stomach might have struck, it might have caused a rupture of the spleen, and death would ensue." Under these circumstances, I think it clear, upon the evidence, that the injury intended to be caused by the prisoner was not such as would be likely, or that he could have known to be likely, to cause death; and I think that, under these circumstances, the prisoner should not have been convicted of culpable homicide, but of causing hurt. Accordingly, I would commute the sentence of the Sessions Judge below to one year's rigorous imprisonment.

The 28th May 1866.

Present :

The Hon'ble F. A. Glover, *Judge.*

Cheating.

Queen versus Puddomonie Boistobee.

Committed by the Magistrate, and tried by the Sessions Judge of Houghly, on a charge of cheating.

Case of cheating a person who was induced to part with his money and to contract marriage under the false impression that the girl he was marrying was a Brahminee.

I see no reason to interfere in this case.

The Sessions Judge placed all the facts of the case fully before the Jury, and laid special stress on the weakness of the evidence; but if the Jury believed that evidence, they were bound to convict the prisoner, as, by it, it was proved that she induced the prosecutor to part with his money and to contract marriage under the false impression that the girl he was marrying was a Brahminee.

There was evidence on the record on both these points, and the Jury chose to believe

it. It was immaterial whether there was any clear proof on the record of the girl being a Boistobee: the point was, that she was not a Brahminee, as she was falsely alleged by the prisoner to be.

As to the severity of the punishment awarded (three years' imprisonment), it was not, I observe, for the Sessions Judge to nullify the verdict of the Jury by passing a sentence inadequate to the offence which they considered proved against the prisoner; and the same reasons prevent my interference on appeal.

The prisoner can, if she be so advised, apply to the Executive Government, with which the opinion so strongly expressed by the Sessions Judge will doubtless have due weight.

The 5th June 1866.

Present :

The Hon'ble W. S. Seton-Karr, *Judge.*

False Evidence—Evidence—(of single witness)—Corroboration.

Queen versus Bakhoree Chowbey.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of giving false evidence.

Comparison of signatures is one kind of corroboration which would justify a conviction on the testimony of a single witness in a case of false evidence.

THERE can be no doubt, to my mind, that the evidence of the vakeel Mohesh Dutt is true, and that the evidence of the prisoner Bakhoree, to the effect that he never verified or presented the written statement, is false.

If the case consisted merely of one oath against another, there would be no doubt that, under the late ruling of the Full Bench in cases of perjury, reported at page 23, Criminal Rulings of the Weekly Reporter, Vol. V., No. 6, the prisoner could not be convicted. But, in this case, the Sessions Judge and the Assessors had the advantage of comparing the signatures of the prisoner—that is, of the signature on the document which he denied, with the signature on that which he admitted; and they were guided by this comparison in coming to a decision.

It appears to me that this is the kind of corroboration contemplated in the ruling alluded to; and in this view I would not interfere with what is a sufficient, legal, and a proper conviction.

Appeal rejected.

RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 9th June 1866.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges*.

Appeal (on the facts)—Trial by Jury—Offence committed before passing of Penal Code.

Queen versus Grish Chunder Bundoo.

Committed by the Magistrate, and tried by the Sessions Judge of East Burdwan, on a charge of being a member of an unlawful assembly, by one of which culpable homicide not amounting to murder was committed.

A person tried by a Jury is entitled to an appeal on the facts if the offence was committed before the passing of the Penal Code.

THE real question in this case is the identity of the prisoner in a riot, attended with homicide, which took place some 11 or 12 years ago.

The offence for which the prisoner has been convicted is substantially that of which others were convicted previous to the passing of the Penal Code. Though the prisoner has been tried by a Jury, he has a right to an appeal on the facts, inasmuch as the offence was committed before the passing of the new laws.

The conviction appears right and proper. The prisoner was named from the very first, and it is shown that he absconded on the hue and cry, though it seems likely that he has returned to his village for some little time past, and has been lately denounced owing to the breaking out of some new quarrel.

Taking the guilt of the prisoner to be established by his proved participation in the unlawful assembly by which a man was killed, it is to be observed that the

prisoner was very young at the time. The Sessions Judge says more than 20 years of age. But one of the witnesses for the prosecution says he was 17 or 18 years of age at that time. Vol. VI

Looking to his youth and inexperience, the sentence on the prisoner may fairly be reduced to two years' rigorous imprisonment. Reduced accordingly.

The 9th June 1866.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges*.

Recognizances to keep the peace.

Criminal Jurisdiction.

Referred under Section 434, Act XXI. of 1861, and Circular Order dated the 15th July 1863.

Keshub Chundro Sandyal and three others.

An unproved charge of false imprisonment is not the credible information contemplated in the law, on which a Magistrate may take recognizances to keep the peace.

We concur with the Sessions Judge. The unproved charge of false imprisonment is certainly not the credible information contemplated in the law. As regards the establishment of a new or rival fact, there does not appear to have been any evidence taken by, or laid before, the Magistrate, nor anything beyond a mere petition of Poresh Narain.

We consider the proceedings of the Joint Magistrate to be irregular and illegal, and, under Section 434 of the Criminal Procedure Code, we quash the order for recognizances from the parties mentioned in the Magistrate's decision.

This order would be no bar to the re-institution of proceedings with a view to recognizances, on fresh and credible information, should any new contingency occur to necessitate such a proceeding.

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The 9th June 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell,
Judges.

**Jurisdiction—Abduction of child for the purpose
of stealing its ornaments—Theft.**

Criminal Jurisdiction.

*Referred under Section 434, Act XXV. of
1861, and Circular Order of the High
Court, dated 15th July 1863, No. 18.*

Queen vs. Sohoy Dome.

Case of abduction of a child for the purpose of stealing its ornaments, which, instead of being committed to the Court of Session for trial, was improperly disposed of by the Magistrate as a case of theft.

In this case the prisoner has been tried before the Assistant Magistrate, Mr. Merington, and convicted of theft, and sentenced to 30 stripes. The sentence has been carried out.

The accused was charged with inveigling away the infant child of the prosecutor late in the evening to an *aheer* at some distance from the village, and robbing him of some ornaments. He was discovered by his parents, at some distance from their home, after dark. The prisoner, in his confession as recorded in the vernacular, admits that he took the child away, and, as the Magistrate, Mr. Drummond, remarks, his statement is substantially a confession of the offence of abduction as defined in Section 362. He should, no doubt, have been committed for trial to the Court of Session under Section 369.

The offence of abducting little children, for the purpose of stealing their clothes or ornaments, is a very serious and dangerous one; and we agree with the Magistrate and Sessions Judge in thinking that the conduct of the Assistant Magistrate in trying and punishing the offence, over which he had no jurisdiction, as one of theft, is highly censurable.

But, as the sentence has actually been carried into effect, we think it, under the circumstances, not necessary to quash the conviction, though the punishment is certainly inadequate.

The 9th June 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell,
Judges.

Irregularity—Reference to proceedings in former cases.

Queen vs. Shobrattee Sheikh.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Nuddea, on a charge of false evidence.

A reference to proceedings in a former case declared to be irregular.

THE prisoner has been tried and convicted, by the verdict of the Jury, of giving false evidence as a witness before the Court of Session, that "*on his return from the Mofussil, on or about the 26th of September last, he did not go to the Police Station of Moheshpore, nor see the Inspector on that day, but, by reason of sickness, went straight to his house without going to the Thannah, and remained in his house till the 29th of September.*"

The prisoner appeals, and the only point is whether the evidence of the Head Constable, who stated that he *did* come to the Police Station on that day, is sufficiently corroborated. In support of his statement, the Head Constable produced a copy of an extract from the day book kept at the Thannah, which he said was written by Wasil Mahomed, a Constable—which extract, according to the regular and usual practice, was sent to the District Superintendent of Police on the 26th, and was subsequently signed by him. On looking at the extract so signed, it appeared that the prisoner's name was down as having been in the Police Station at about midday on the 26th September, and that he was appointed to keep the 2nd watch on that day. This document being an entry made contemporaneously with the fact which it recites and in the usual course of business, and being authenticated by the signature of the District Superintendent, is strong evidence to corroborate the statement of the Inspector that the facts took place as they are there recorded.

Under these circumstances, the appeal must be dismissed, there being evidence to go to the Jury to prove the falseness of the statement made by the prisoner. We observe, however, that there has been a serious irregularity in the trial.

The Sessions Judge read to the Jury the remarks recorded by the Judge after receiving the verdict of the Jury, and of the Jury

in the former case, being expressions of the opinion of the Judge and Jury, that the now defendant, who had given evidence in that case, was in league with the prisoners who were in that case convicted of forgery.

This was wholly irregular. A reference to the proceedings in the former case in this manner must have tended to prejudice the minds of the Jury on the present occasion. Taking the case to be one of simple false statement, we think that the sentence may be properly reduced to 6 months' rigorous imprisonment.

The 11th June 1865.

Present :

The Hon'ble L. S. Jackson, *Judge*.

Cognizance of offence by Magistrate without complaint but on information.

Miscellaneous Case.

Ramruttun Neogee and others, *Petitioners*.

Baboo Oprokash Chunder Mookerjee and Onookool Chunder Mookerjee for Petitioner.

A Magistrate may take cognizance of a case, on the information of a third person, without any complaint by the party injured.

THE argument of the petitioner's vakeel in this case is that, as the party injured has not complained before the Magistrate, but information was given by a third person with no personal interest in the matter, the Magistrate ought not to have taken up the case. Section 68 of the Code of Criminal Procedure, however, authorizes the Magistrate of the District, or a Magistrate in charge of a Division of a District, without any complaint, to take cognizance of any offence which may come to his knowledge, except in the cases provided for by Chapter XI. of the Code. The Magistrate, therefore, was justified in taking up this case on the information which he received, and there is nothing illegal in his proceedings.

The 11th June 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell, *Judges*.

Insane prisoners—Procedure.

Criminal Jurisdiction.

Referred under Section 394, Act XXV. of 1861, and Circular Order No. 18, dated 15th July 1863.

Queen vs. Rughooa.

Where a Magistrate has kept in custody an insane prisoner and reported the case to Government, his successor, instead of striking off the case, is bound to resume the investigation under Section 391, Code of Criminal Procedure.

ONE Rughooa being charged with stealing an ox, it was reported that he was of unsound mind. Mr. Brett, the Assistant Commissioner of Lohurdugga, ordered that he should be examined by the Civil Surgeon, whose evidence was duly taken by him, in accordance with Section 388 of the Code of Criminal Procedure, on the 17th June 1864. The Civil Surgeon stated that the prisoner was of unsound mind, and not responsible for his actions.

Mr. Brett then took the evidence of some witnesses, and, finding that there was no doubt that the prisoner did take the cattle, directed him to be kept in confinement, and that the case should be reported for the orders of Government.

He did not put the prisoner on his defence, or express any opinion as to whether or not he was of unsound mind at the time when the cattle was taken; and though he refers to Section 393 as making it necessary, when a prisoner is acquitted upon the ground of insanity, that the finding should state whether he committed the act or not, there was in fact no complete trial and no acquittal.

The proceeding and order of the Magistrate, though irregular by reason of the reference to Section 393, appears to us to be good as an enquiry and order under Section 390.

The prisoner was sent, under the orders of Government, to the Patna Lunatic Asylum, and subsequently discharged. He was then brought before Mr. Lillingstone, the present Deputy Commissioner, who, instead of resuming the investigation, as he should have done, under Section 391, ordered the case to be struck off.

No intelligible reason is assigned by Mr. Lillingstone for this order. He says that, "as the Magistrate, in the first instance, proceeded as if the prisoner was considered insane

Vol. VI. at the time of committing the offence, I consider it would be irregular now to act upon any other view."

We wholly fail to understand the force of this observation. The present Assistant Commissioner has nothing to do with the opinions, or presumed opinions, of his predecessor. He had before him a prisoner who had never been put upon his trial. He was bound to take up the case under Section 391 and to try him, and his order striking off the case must be quashed.

The 11th June 1866.

Present :

The Hon'ble L. S. Jackson, *Judge*.

Land Disputes.

Miscellaneous Case.

Mussamut Zuhoorun and Mussamut Begum,
Petitioners.

Held that it would be highly technical and unnecessary to interfere with a Magistrate's order under Section 318, Code of Criminal Procedure, on the ground that the Magistrate had not formally stated that he was satisfied that a dispute likely to induce a breach of the peace existed, when obviously the Magistrate had information of that kind before him.

It appears that, in this case, the Magistrate had actually before him information from the Police Officer, founded upon an enquiry which that Officer had made on the spot, that a breach of the peace was likely to occur in respect of the property concerned, and, in fact, the order of the Magistrate, instituting proceedings under Section 318 of the Code of Criminal Procedure, was actually endorsed on the report of that Officer. This being so, although the Magistrate has not formally stated that he was satisfied that a dispute likely to induce a breach of the peace existed, when obviously the Magistrate had information of that kind before him, which he manifestly acted upon, it would be highly technical and unnecessary to interfere with the Magistrate's order on the ground of such informality.

The appeal is, therefore, rejected.

The 18th June 1866.

Present :

The Hon'ble L. S. Jackson and G. Campbell,
Judges.

Land Disputes.

Criminal Jurisdiction.

Referred under Section 434, Act XXV. of 1861, and Circular Order dated 15th July 1863, No. 18.

Kisheb Chunder Sandyal, *Petitioner.*

Prompt action is generally requisite in cases of dangerous disputes regarding the possession of land.

Campbell, J.—I CAN see no illegality. The parties, being called on to show cause, said that they had no objection to enter into recognizances, and I think that the English record is sufficient. It appears to me that the Magistrate, upon the pleadings, could hardly have done more under Chapter XVIII. But I think that, seeing the gravity of the reports made to him, he much failed in his duty in neglecting to make prompt enquiry whether there really was a dangerous dispute regarding the possession of certain lands, and, if so, deciding the matter under Chapter XXII. If, in the course of such an enquiry, he had found that any parties were to blame, he might well have also taken recognizances or security from them or punished them.

Jackson, J.—I am of the same opinion. When the parties professed their readiness to be bound, and declared they had no objection, it is difficult to see how the "examination" on this point could have been usefully continued.

The case, as reported by the Inspector of Police, appears to have been just such a case as to call for an enquiry under Section 318, and in the course of that enquiry it might very probably have come out who the parties were from whom a disturbance was chiefly to be apprehended. But I do not think there is ground for censuring the Joint Magistrate or for setting aside his order.

Prompt action is generally requisite in these cases.

The 18th June 1866.

Present:

The Hon'ble L. S. Jackson and G. Campbell, *Judges*.

Theft and Mischief (Double sentence for).

Criminal Jurisdiction.

Referred under Section 434, Act XXI. of 1861, and Circular Order dated 15th July 1863.

Bichuk Aheer *versus* Aubuck Bhooneea and others.

A double sentence for theft and mischief is illegal and improper.

THE double sentences for theft and mischief are clearly illegal and improper, and the sentence passed under Section 429 must be set aside.

But the Judicial Commissioner's statement, that the conviction of the prisoner Leydah under Section 379 is illegal, and that there was no evidence against him is not correct, as a more careful examination of the case would have shown. The question apart whether the statements of some of the prisoners are evidence against another, it appears that there was abundant evidence that Leydah himself confessed, and the conviction seems entirely proper. The witnesses might, perhaps, have been more particularly examined on the point; but the Assistant Commissioner says that the man even confessed to himself.

The 18th June 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges*.

Evidence—Section 48, Act II. of 1855 (applicable to Criminal trials)—Comparison of seals.

Queen *vs.* Amanoollah Mollah.

Committed by the Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of dishonestly using as genuine false documents, &c.

Section 48, Act II. of 1855, is applicable to criminal trials.

The test of comparison of Native seals is at best but a fallible one, and must always be received with extreme caution.

THIS prisoner has been convicted, by the Sessions Judge of Rajshahye, of the offence described in Section 471 of the Indian Penal Code, that is to say, of fraudulently using as

genuine two documents which he knew, or had reason to believe, to be forged documents. The sentence is seven years' transportation and fine of rupees five hundred; in default of payment, one year in addition in transportation.

The documents alleged to be forged are a pottah dated the 2nd Bysakh 1267, and an entry in a *hath-chittah*.

The Sessions Judge mainly relies upon a comparison of the impression of the seal affixed to the will of Radha Kishto Shaha, which is said to be a genuine instrument, with the impressions of the seal affixed to the pottah and entry in the *hath-chittah* which are impugned.

The learned Counsel for the prisoner, Mr. Paul, contends that Section 48, Act II. of 1855, is not applicable to criminal trials, and, further, that a comparison is only admissible when it is made with a seal which is not disputed by the prisoner.

We are of opinion that the Section is applicable to criminal trials (*see* Goodeve on Evidence, page 201). The will of Radha Kishto and the seal affixed thereto are not admitted by the prisoners, and we have not been shewn that this will has been formally accepted as proved in any Court of Justice. The prisoner challenged its authenticity, and, under the circumstances, we are of opinion that the will and the seal impressed upon it cannot be said to be "undisputed."

To draw any inference of the guilt of the prisoner from a comparison with a document of this nature is, in our opinion, not fair to the prisoner.

At the best, the test of comparison between the impression of one Native seal with another is but a fallible one, and must always be received with extreme caution. We have taken considerable pains in comparing the impressions of the seals affixed to the pottah and *hath-chittah*, the suspected documents, with the impression of seals said to be genuine. The result is that the impressions of the alleged genuine seals do not precisely agree the one with the other, for measuring one letter to another of the inscriptions the method adopted by the Sessions Judge we find that there are differences even in the alleged genuine seals. The impressions of the seals affixed to the pottah and *hath-chittah*, when compared with the impressions of the alleged genuine seals, certainly do not differ more than the alleged genuine impressions do one with another. On the whole, and after careful consideration, the evidence, in our opinion, is so very

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Vol. VI. doubtful that we hesitate to convict the prisoner upon it, more particularly as the evidence in this case is based upon comparison of seals—a test which this Court is quite as competent to apply as the Lower Court. We observe that the pottah purports to be a farming lease, for a term of ten years, of an eight-anna share in an estate of which it is admitted the prisoner holds the other moiety.

We entirely differ with the Sessions Judge, who holds that the evidence proves that the prisoner managed the moiety of the estate as a servant, and not as a lessee. We do not find that the witnesses for the prosecution deposed to the fact that prisoner managed it as a servant. The account-books of Radha Kishto, which have been admitted to be genuine by the prosecution, have been examined by us, and they certainly seem to prove that the prisoner held the estate as a lessee; but, be this as it may, we are not at all satisfied that the documents which are impugned are forged. The prisoner must be released.

The 18th June 1866.

Present :

The Hon'ble L. S. Jackson and G. Campbell,
Judges.

Security for good behaviour—Section 297, Code of Criminal Procedure.

The order in this case calling upon the prisoner to furnish security for good behaviour under Section 297, Code of Criminal Procedure, set aside as erroneous, that Section not referring to persons of a violent or turbulent character.

Miscellaneous Case.

Narain Sooboodhi, *Petitioner.*

It appears to us that the order passed by the Deputy Magistrate, and confirmed by the Sessions Judge in this case, is entirely erroneous. The petitioner was called upon to furnish security for his good behaviour under Section 297 of the Code of Criminal Procedure. That Section, however, refers, not to persons of a violent or turbulent character, but to "robbers, house-breakers, thieves, or receivers of stolen property who are of a character so desperate and dangerous as to render their release, without security, at the expiration of the limited period of one year, hazardous to the community." The order must, therefore, be set aside.

The 18th June 1866.

Present :

The Hon'ble F. A. Glover, *Judge.*

Section 405, Code of Criminal Procedure—Mitigation of sentence.

Queen *versus* Bissonath Mitter.

Committed by the Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of criminal breach of trust.

The High Court (like the Sessions Judge) cannot nullify the verdict of a Jury by interfering to lessen the punishment. Section 405 refers to cases where the offence is proved, but where the punishment inflicted is held to be too severe, and not to cases where the conviction itself is considered improper.

Mr. COCHRANE, for the prisoner, urges that, under Section 405, Code of Criminal Procedure, this Court should exercise its power of modifying the sentence passed by the Sessions Judge.

It has been several times ruled by this Court that, although a Judge may dissent from the verdict of a Jury, he is still bound not to nullify it by passing a sentence inadequate to the offence held by the Jury to be proved, and the prisoner's remedy is to apply to the Local Government for a remission of his sentence.

This Court is, in my opinion, bound equally with the Sessions Judge not to make a verdict of no effect by interfering to lessen the punishment. Section 405 refers to cases where the offence is proved, but where the punishment inflicted is held to be too severe, and not to cases where the conviction itself is considered improper.

As I am bound to take the verdict of the Jury to be a proper verdict, it follows that I cannot consistently modify a sentence which, if the offence be proved, is not too severe.

The prisoner can, if he be so advised, apply to the Executive Government, with which the opinion of the Judge will doubtless have proper weight.

The 18th June 1866.

Present :

The Hon'ble L. S. Jackson and
G. Campbell, *Judges*.

Evidence—Proceedings in other trials.

Queen *versus* Kishen Dyal Aheer and
others.*Committed by the Magistrate, and tried by
the Officiating Sessions Judge of Shahabad,
on a charge of dacoity attended with
grievous hurt.*Every trial must be complete in itself. In deciding
on the guilt of a prisoner, the proceedings in other trials
ought not to be relied upon.THE petition of appeal in this case contains
no specific ground of dissatisfaction
with the judgment of the Court of Session ;
and, referring to the record, we are not inclined
to think that the prisoners have suffered
any substantial prejudice, or that
there are good reasons for doubting their
complicity in the dacoity.But it is our duty to remark upon the
irregular and almost insufficient mode in
which the Court of Session has recorded
the evidence against the prisoners.The Sessions Judge remarks that it has
been on former occasions recorded at length,
apparently forgetting that the prisoners
then before him had not been present on
those occasions, and that, although a good
argument as to the credibility of the witnesses
might be drawn from the fact that
convictions founded on their testimony
had been sustained in appeal before this
Court, yet the circumstance of those witnesses
having been already examined at
length, on a previous trial, was no reason
at all for examining them on this occasion
with such brevity as to leave it almost in
doubt as to the commission of what crime
they were deposing to.If there had been the least additional
reason for doubting whether the prisoners
were really guilty, it would have been necessary
to annul the sentence and to order
a new trial, to the great hardship of the
witnesses for the prosecution.We trust the Sessions Judge will, on
future occasions, bear in mind that every
trial must be complete in itself, and that
it is not admissible, in deciding on the guilt
of the prisoners before him, to rely upon
the proceedings in other trials.

The appeal of the prisoners is rejected.

The 20th June 1866.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief
Justice*, and the Hon'ble F. B. Kemp,
W. S. Seton-Karr, G. Campbell, and A. G.
Macpherson, *Judges*.Code of Criminal Procedure, Sections 405 and
428—Mitigation of a sentence confirmed or
passed by Sessions Judge on appeal.

Miscellaneous Case.

Bissumbhur Shaha, *Petitioner*.*Baboo Ootool Chunder Mookerjee* for Petitioner.*Baboo Juggodanund Mookerjee* for Government.The High Court has power to mitigate, on the
ground of its being excessive, a sentence passed by a
Magistrate and confirmed in appeal by the Sessions
Judge, or a sentence passed in appeal by the Sessions
Judge altering a sentence passed by a Magistrate.*This case was referred to a Full Bench
by Justices Seton-Karr and Macpherson,
with the following orders :—**Macpherson, J.* In this case, Mr. Doyne,
on behalf of the petitioner, applies to the
Court to reduce a sentence passed by a Magistrate
and confirmed in appeal by the Sessions Judge,
on the one ground that the sentence is excessive.
It is not alleged that there is any defect in law
in the conviction. The first question that arises
is whether the Court has power to entertain
such an application.It appears to me, reading Section 405
of the Criminal Procedure Code along with
Section 428, that this Court has the power
which Mr. Doyne contends it has. But it
has recently been ruled otherwise (*Reg.
versus Ramdhun Mundul*, 4 W. R. 15 C. R.).
In that case, Mr. Justice Seton-Karr inclining
to the opinion that, under Section 405,
the Court may interfere to mitigate a sentence
of a Magistrate confirmed by the Sessions
Court, and Mr. Justice Kemp thinking
such a sentence is final, the question was
referred to Mr. Justice Loch, who also held
that the sentence is final. In that view of
the matter I do not concur, because it seems
opposed to the terms of Section 428. By
Section 405, the Court is empowered to mitigate
the sentence passed in any case tried
by any Court of Session. It is said, and

Vol. VI. has been decided in Ramdhun Mundul's case, that the words "tried by any Court of Session" means tried by a Court of Session sitting, not as an Appellate Court, but as a Court of Original Jurisdiction only. But Section 428 enacts that, "*except as provided in Section 405 of this Act, sentences and orders passed by an Appellate Court upon appeal shall be final.*" The exception in this Section seems to me expressly to provide for the case which is now before us, and I therefore cannot limit Section 405 to cases tried by the Court of Session sitting as a Court of Original Jurisdiction. Mr. Justice Loch attempts to get over the difficulty created by Section 428 by holding that Section 405 is mentioned in Section 428 by mistake for 404, and he accordingly deals with the question as if 404, and not 405, were referred to in Section 428. But it is not for this Court to say that the Acts of the Legislature do not mean that which the words used in them do and necessarily must mean. If the Legislature has excepted Section 405, it is not for this Court to say that in fact it has excepted, not Section 405, but Section 404, merely because it appears to the Court that the Act would have been better or more consistent if 404 had been the Section excepted. If Section 405 is the Section mentioned in Section 428, this Court goes beyond its jurisdiction, and enters on the province of Legislation in reading Section 428 as if the Section excepted in it were Section 404.

Under these circumstances, I think that the following question ought to be referred for the decision of a Full Bench: Has this Court power to mitigate, on the ground of its being excessive, a sentence passed by a Magistrate and confirmed in appeal by the Sessions Judge, or a sentence passed in appeal by the Sessions Judge altering a sentence passed by a Magistrate.

Selon-Karr, J.—I have always had doubts on this point, and expressed them in the judgment referred to by my colleague, Mr. Justice Macpherson.

I think it very desirable that the question should be referred to a Full Bench.

JUDGMENT OF FULL BENCH.

Peacock, C.J. (Kemp, J., concurring).—I do not think that there is any doubt in this case, when we read Sections 405 and 428 of the Code of Criminal Procedure together. There might have been some doubt if Section 405 stood alone. It says: "It shall be lawful for the Sudder Court to call for and examine the record of any case tried

"by any Court of Session." The words "any case tried by any Court of Session" might mean only a case tried by a Court of Session in the exercise of original jurisdiction. But, when we read Section 428, all doubt is removed. It says: "Except as provided in Section 405 of this Act, sentences and orders passed by an Appellate Court upon appeal shall be final." When the Legislature refers to Section 405, we must construe the Act as meaning Section 405, and not Section 404. If "Section 404" is in the original record of the Act, and "Section 405" is merely an error of the printer, the case would be different. But we do not think it likely that the words "Section 405" are a misprint. We have not the original here to compare it with the print.

Then if we read "405" as the Section referred to in Section 428, Section 428 shows that the Court under Section 405 may be an Appellate Court. If so, then the words "tried by any Court of Session" must mean a Court of Session sitting either as a Court of original or as a Court of appellate jurisdiction, and the case becomes perfectly clear.

If we look to the reason of the thing, I think it quite right and just that Section 405 should be read with the interpretation which I have put upon it.

Suppose a man should be indicted before the Sessions Court for house-trespass in order to commit theft under Section 451 of the Penal Code, and that it should be proved that he was a starving man in Cuttack and Pooree who was passing by a godown where there was rice, and that he went in and stole a handful. He would be guilty of house-trespass for the purpose of committing theft, and would be liable to imprisonment for 7 years and also to fine. Suppose the Sessions Judge should try him and sentence him for such an offence as that to 2 years' rigorous imprisonment; this Court could call for the record and set the matter right by mitigating the sentence. But suppose another man was tried for a similar offence committed under similar circumstances, not by the Court of Session, but by the Magistrate of the district, and should be sentenced to 2 years' rigorous imprisonment and to fine, and the Sessions Judge on appeal should mitigate the sentence by omitting the fine and leaving the 2 years' rigorous imprisonment. If this Court could not interfere in the latter case, this consequence would follow, that the Court could mitigate a sentence of 2 years' rigorous imprisonment passed by a Court of Session

as a Court of original jurisdiction, but that it could not mitigate a sentence of 2 years' rigorous imprisonment allowed by a Court of Session on appeal to stand for a similar offence. I think it very reasonable that, whenever this Court is satisfied that a sentence is wrong in point of law, or is too severe for the offence proved, it should have the power of setting that sentence right. It could not do so upon appeal in a case tried originally by a Lower Court, and appealed to the Sessions Court. But I think that the Legislature intended that the highest Court should have the power to grant relief in a case in which a sentence affirmed by a Court of Session sitting as an Appellate Court, or altered by that Court on appeal, and therefore substantially passed by it, is either contrary to law or improper as being too severe. In a case heard by a Sessions Court on appeal, the relief cannot be obtained as a matter of course; but the High Court must have such a case made out as to induce it to call for and examine the record.

Seton-Karr, J. I wish to add nothing to what has fallen from the learned Chief Justice, with whom I entirely concur, except that I always entertained the doubts which I expressed in the case of Ramdhun Mundul adversely to the opinion of my colleagues (reported in 4 Weekly Reporter, Criminal Rulings, p. 15); that I still entertained those doubts, when I referred the case to a Full Bench, with Mr. Justice Macpherson; and that I am confirmed in the opinion I entertained on both occasions, after hearing the arguments on both sides to-day, which have converted those doubts into certainties.

Campbell, J.—I also concur. I had a good deal of doubt in the case. It did not appear to me altogether so clear as it has been now put by the learned Chief Justice. Still, on the whole, I agree in the opinion expressed by my learned colleagues.

Taking Section 405 alone, I should have been inclined to consider that the words "tried by any Court of Session" refer to the Court sitting as a Court of original jurisdiction; because, looking at Chapter XXV., there throughout the word "trial" is used as referring to the proceedings in the Court of original jurisdiction, and to that kind of trial only. But, as I think that the Section admits of doubt, it may be construed by a reference to other Sections.

Section 428 is clearly inconsistent with the construction that Section 405 is restricted to trials by Courts of Session in original jurisdiction. At the same time I should

like to point out that, in any construction, there is some inconsistency in this part of the Code, because, where a Subordinate Magistrate has passed a sentence which has been appealed to the Magistrate of the District, and the Magistrate of the District, in deciding that appeal, has committed, it may be, a gross illegality, in that case, under Section 404, this Court has the power to set the matter right as respects the point of law; whereas Section 428 would seem to provide that sentences or orders of an Appellate Court shall be final except as provided in Section 405, making no reference to Section 404. There, it seems to me, must necessarily be some contradiction. But, because there is one inconsistency, that is no reason why we must also make another; and, as I am not satisfied that in Section 428 the figure "405" is a misprint or mistake for "404," I think we must consider that Section "405" refers to the proceedings of an Appellate Court, *viz.*, Court of Session, and that this Court has the power to interfere as regards the decisions of a Court of Session sitting as an Appellate Court for the trial of criminal cases to the full extent provided by Section 405.

Macpherson, J. I remain of the same opinion as that which I have already expressed. Whatever inconsistencies there may be in the provisions of the Criminal Procedure Code, I think that, reading Sections 405 and 428 together, it is impossible to come to any other conclusion than that which has been arrived at to-day.

The 21st June 1866.

Present :

The Hon'ble W. S. Seton-Karr, *Judge.*

Dacoity (aggravated)—Calendar (to contain grounds of commitment and remarks of committing officer).

Queen versus Khooda Sonthal and others.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of dacoity.

Severe sentence of transportation for life in a case of aggravated dacoity confirmed as required by the state of the district.

The grounds of commitment and the remarks of the committing officer should be entered or copied in the Calendar which ought to be complete in itself.

The prisoners have been convicted of a very aggravated dacoity, on their own admissions before the Deputy Magistrate. Some of the dacoits repeated, at the Sessions, their

Vol. VI. admissions of their presence at the dacoity. The admissions are confirmed by the immediate search which was instituted, and by the discovery of sundry articles of property with the dacoits.

The crime, as the Sessions Judge observes, is a very aggravated one. One man was killed, and one old woman was frightfully beaten. The state of the district requires a severe example, and I shall not interfere.

I observe a practice which, I believe, is confined to the Midnapore district, namely, that the grounds of commitment are not copied into the Calendar as they ought to be, but are left buried in a mass of papers in the record.

This is irregular, and causes loss of time to the Appellate Court. The Calendar should be complete in itself, and the remarks of the committing officer should be entered in, or copied into, the proper column of the Calendar.

The appeals are all rejected.

The 23rd June 1866.

Present :

The Hon'ble W. S. Seton-Karr and W. Markby, *Judges.*

Land dispute—Possession under decree of Civil Court.

Shama Soondery Debia, *Petitioner.*

Messrs. Jardine, Skinner, & Co.

Committed by the Magistrate of Berham-pore, and tried by the Sessions Judge of Moorshedabad, on a charge of unlawful of lands.

A Magistrate ought not to interfere, under Section 318, Code of Criminal Procedure, with the execution of a decree of the Civil Court. If called in to interfere at all because he is apprehensive of a breach of the peace, he should, under Section 319, maintain in possession the person who has been actually put in possession by a decree of the Civil Court.

This is a case which has been referred to us under Section 434 of the Criminal Procedure Code, and we have heard Mr. Paul in support of the recommendation of the Sessions Judge that the order of the Magistrate should be quashed, as well as Mr.

Allan in reply to him, at some considerable length.

We are clear that the order of the Magistrate is illegal, and cannot be permitted to stand.

The petitioner, Ranee Shama Soondery, has been put in possession of the share in the lands claimed by her under a decree of the Principal Sudder Ameen, confirmed in appeal by the High Court on the 18th July 1865 (Weekly Reporter, p. 144, Civil Rulings).

An Ameen has been deputed to the spot, and the petitioner has given him a receipt stating herself to have been placed in "khas" possession of the lands, or, to speak correctly, of her 2½ annas share in them, the lands amounting to some 8,633 beegahs in extent.

We hold that it was not competent to the Magistrate to interfere, under Section 318 of the Criminal Procedure Code, with the execution of a decree of the Civil Court, affirmed, as it had been, by the highest Court of the country, or to say that the word "khas," as used in giving possession, must be "an error," or to lay it down that the petitioner had no right to come on the lands "except as collector of rent."

Mr. Allan contends that his clients, Messrs. Jardine, Skinner, and Co., have actual and tangible possession of certain parts of the lands which have not been actually defined or interfered with by the Ameen, and that they cannot be ousted, as no provision for their ouster is contained in the decree. We find, however, on reference to the decision of the High Court of July last, already quoted, that Messrs. Jardine, Skinner, and Co. never then pleaded any right derived from occupancy, and that the Divisional Bench then expressly ruled that they could not call on the plaintiff, the Ranee, to acknowledge them as her tenants.

Moreover, we are informed that the case, giving the Ranee possession, is pending in appeal in the Miscellaneous Department, and, if there had been any doubt as to the exact meaning, intent, and object of the decree, the matter was one which ought to be adjudicated on in that Department, and not in the Criminal Court.

In fact, looking to the possession of the parties and to the state of the dispute, the Magistrate, if called in to interfere at all under Chapter XXII. of the Code of Criminal Procedure, because he was apprehensive of a breach of the peace, should have kept the Ranee in possession under Section

319 as the party who had been actually placed in possession by a decree of the Civil Court.

For the purposes of the reference before us, we, therefore, acting under Section 434 of the Code, quash the proceedings of the Magistrate held under Section 318, and declare them null and void. In so doing, we are acting in strict accordance with a decision of this Court of the 27th April 1864, in the case of Kali Soondery Chowdraney, referred from Rajshahye, and decided by Justices Loch and L. S. Jackson under the above Section.

The 25th June 1866.

Present :

The Hon'ble L. S. Jackson and W. Markby, Judges.

False Evidence—Discretion of Civil Court in sanctioning charge of.

Queen versus Poosa Ram and two others.

Committed by the Magistrate of Darjeeling, and tried by the Sessions Judge of Dinapore, on a charge of giving false evidence.

Mr. R. E. Twisdale for Petitioners.

Unsatisfactory conviction for perjury, where the evidence was balanced as to numbers, and where the story for the prosecution was improbable, reversed.

The discretion vested in a Civil Court under Section 160, Code of Criminal Procedure, of sanctioning a criminal charge of perjury, is one that should be most carefully exercised.

Remarks on the present case in which the discretion was improperly exercised.

Jackson, J. It appears to me that it would be quite unsafe to sustain a conviction arrived at under such circumstances as the present. The prisoners were, two of them witnesses, and the third plaintiff, in a civil suit brought against the prosecutor, Mr. Cleeve. Motee Ram sued Mr. Cleeve upon a note of hand (an I. O. U.) for 1,600 rupees. He alleged that, although he had executed the I. O. U., there was an understanding that he was to pay in 18 months' time. The witnesses called by the plaintiff, on the other hand, deposed that there was no such verbal agreement, but that he was to pay within 8 days. The Civil Court which tried the suit, it appears, gave a decree against Mr. Cleeve as prayed by the plaintiff. After this, on Mr. Cleeve's application, the Civil Court allowed him to institute criminal proceedings against these parties for giving false evidence and making use of this evidence knowing it to be false.

On the trial, Mr. Cleeve himself appeared with three persons whom he called as witnesses, and they deposed that the third prisoner, Motee Ram, who came to Mr. Cleeve for the purpose of settling his account, came alone, unaccompanied by any one else; and upon this the Sessions Judge, sitting with two European Assessors, has convicted the prisoners, and sentenced them to one year's rigorous imprisonment.

The first thing which strikes one on looking at this case is, that it is merely one of a balance of testimony. On the one side were the plaintiff and his two witnesses; on the other were Mr. Cleeve and his three witnesses; and then we find that the prisoners called another independent witness, who very strongly and substantially corroborated what they had originally said, and thus bringing the testimony to an absolute balance, there being four oaths on the one side, and four oaths on the other.

In addition to this, I am bound to say that the account given by Mr. Cleeve is one which it would be extremely difficult to believe. He states in his deposition before the Sessions Court:

"On that same day, after making up the account between us, I gave defendant No. 3 a note of hand or I. O. U. for 1,600 rupees payable at my convenience. It was my intention to leave Hope Town for good early in the month of February following, but previous to doing so I sent for defendant No. 3, and told him that, on condition of his not taking any steps to sue me for the amount of the I. O. U., I would agree to pay him twelve per cent. per annum until such time as the amount was liquidated."

Now, here was a European resident of this remote place, Hope Town, having money-transactions with a trader there, and he says that he was about to leave the place for good, and yet we are to suppose that this trader accepted, without any sort of security, a note of hand with 12 per cent. interest payable up to the time of liquidation. That statement in itself is almost incredible; and then, again, if we look at the testimony upon which these persons have been convicted, we find (take only one instance; there may possibly be more, but here there is a very startling discrepancy) Mr. Cleeve says:—

"Defendant No. 3 came up alone to my house; I saw him walking up to my door. I first spoke to him outside the house, and then asked him to walk into the dining-room, when I made out the account."

Vol. VI. Then, on turning to the evidence of one of his witnesses, Bhochun, witness No. 3, he says:—

"Motee Ram came of his own accord; when he came, I gave notice to the sahib. He came alone. The sahib told me to call him in. The sahib did not go outside. Witness No. 2 was in the room at the time."

This is directly the contrary to what is said by Mr. Cleeve himself.

Then the prisoners were persons, it seems, in a respectable class of life, and not the sort of persons who might have been hired or retained as common witnesses, and whose testimony apparently was not, *prima facie*, unworthy of belief. It certainly cannot be said that the witnesses for the prosecution were witnesses of a higher grade, or more worthy of belief. One was a chuprassee, another a mistress, and all of them either then were or had been previously in the service of the prosecutor.

Under these circumstances, it appears to me that it would be quite unsafe to affirm the conviction of these prisoners.

I think, therefore, that the conviction ought to be reversed, and they released.

Moreover, it appears to me that this is precisely a case in which the Judge of the Civil Court, who tried the original suit, ought to have very carefully exercised the discretion vested in him by Section 169 of the Code of Criminal Procedure. That Section provides:

"A charge of an offence against public justice described in Sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211, or 228 of the Indian Penal Code, when such offence is committed before or against a Civil or Criminal Court, shall not be entertained in the Criminal Courts, except with the sanction of the Civil or Criminal Court before or against which the offence was committed."

That was a provision substantially similar to the law which formerly prevailed, and which expressly provided that persons against whom a civil suit had been successfully prosecuted, and who from vindictive motives should be desirous of bringing their adversaries into the Criminal Courts, and harassing them by charges of perjury and forgery, should not be allowed to do so, unless the Court where the suit was tried saw cause to permit it.

In this case, whatever the Judge might have thought as to the accuracy of the witnesses in matters of detail, it is plain that

he believed their story in the main, because he passed a decree for the plaintiff.

I think, therefore, this was a case in which the Judge should have been extremely unwilling to allow a prosecution. But Mr. Cleeve says (on the question being put to him, "Did defendants 1 and 2 give their evidence before you in the civil suit, and did you then, before the Judge, impugn it as false?"): "Yes; and the Judge told me 'to prosecute them criminally if I had any charge against them,' thus, in fact, encouraging him to bring the criminal charge.

It appears to me that the discretion vested in the Court was very improperly exercised in this case, and that the proceedings ought not to have been permitted.

Markby, J. I also entirely agree that the decision of the Judge ought to be reversed.

It appears that the defendants were tradesmen in partnership, and that the prosecutor was in their debt. The prosecutor had given to the defendants an acknowledgment of his debt in the form of an I. O. U. A suit to recover the debt was afterwards brought by the defendants, and the defence set up by the prosecutor was that, at the time the acknowledgment was given, an arrangement was made that no proceeding should be taken to recover the debt as long as interest was paid at the rate of 12 per cent. The defendants, however, denied that that arrangement had been made. On the contrary, they all three swore that they were all present when the I. O. U. was given, and that the arrangement was that the money was to be paid within 8 days. On the other hand, the prosecutor swore that one of the defendants alone was present.

There was, therefore, in that suit, a direct conflict of testimony between the prosecutor and the defendants. The suit was decided in favor of the defendants, whereupon the prosecutor turned round and charged the defendants with having given false testimony; and it is hardly necessary to say that this was a proceeding which ought to be very carefully watched.

The Judge below disposes of the case by saying that the evidence adduced by the defendants is extremely weak and inconsistent. If that had been so, it would have been a good reason for finding them guilty. But, I think, the evidence given by the defendants is at least as strong as that given by the prosecution. Indeed, looking at the inconsistency pointed out by my brother Jackson between the evidence of the prosecutor and that of one of his witnesses, I think the

preponderance is rather in favour of the evidence given for the defence. On the one hand, there was the statement of the prosecutor himself, and three witnesses, all more or less dependent on him. On the other hand, there is the statement of the three defendants, supported by a witness who is entirely independent of them, who positively supports their statement, and who was not even cross-examined by the prosecutor.

I think, therefore, that there is no ground for the remark that the evidence for the defendants was weak and inconsistent, and that there was no sort of evidence given by the prosecutor which is necessary in a case like the present to convict the prisoners.

I also entirely agree in the remarks made by my brother Jackson as to great caution being necessary in allowing such prosecutions for perjury, which are, in fact, an indirect mode of re-opening a case upon which a decision had been already given. It would be most undesirable that criminal proceedings should be for any such purpose so totally misapplied.

The 25th June 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell,
Judges.

Discharge—Acquittal—European British subjects—Evidence.

Criminal Jurisdiction.

Queen versus Robert Sheriff.

Revised under Section 404, Criminal Procedure Code.

Where no charge in writing has been drawn up, and the prisoner has not been asked to make his defence, the Magistrate, if he thinks that no offence has been proved, can only discharge and not acquit the prisoner.

Nor can the Magistrate acquit a prisoner whom he has no jurisdiction to try.

Mode of procedure by a Magistrate with regard to European British subject accused of an offence.

Remarks on the imperfect enquiry in this case with reference to the examination of witnesses.

THIS case has been sent for under Section 404, the attention of the Court having been called to it by the Government of Bengal.

On the evening of the 13th of February last, the officiating District Superintendent of Police at Cachar received information

that Mr. Sheriff, the Manager of the Deedar Kaash Gardens, was charged with causing the death of an infant only a few days old, the child of one Kulgi, a cooly labourer in that garden. The woman said she was sitting in the lines giving the child suck, when the accused came into the lines, began to beat the men, and also beat her. One blow accidentally hit the child which was at her breast; blood flowed from its nose, and it died almost immediately. The Superintendent made an enquiry. It being late in the evening, he allowed Mr. Sheriff to go to the Cachar Planters' Hotel, taking from him a recognizance binding him to appear the next morning. On the 14th, the Civil Surgeon examined the bodies of the deceased infant and the woman Kulgi, and on the same day the report of the police officer was forwarded to the Magistrate.

It does not appear that the Magistrate proceeded with the case from the 14th to the 28th of February a delay which appears to us inexcusable. The report of the Superintendent of Police informed the Assistant Commissioner that an offence had been committed which was apparently punishable with imprisonment for two years under Section 338 of the Indian Penal Code, or possibly under Section 323. In either case, it was an offence which the Assistant Commissioner, who appears to have the full powers of a Magistrate, was competent to deal with.

On the 28th of February, the Assistant Commissioner proceeded to take the evidence of the witnesses. The record of this proceeding is most imperfect. It does not show that the witnesses examined on the 28th were either sworn or, if Hindoos or Mahomedans, affirmed under Act V. of 1840. There is nothing in the record, from the beginning to the end, to show whether or not the accused was ever in custody or present during any part of the enquiry, though it appears that he was summoned for the 28th. There are certain expressions in the evidence which look as if some one had put questions in the interest of the accused, but there is nothing to show whether or not there was any cross-examination by him. Except in the case of the first, and perhaps the second, witness examined on the 28th of February, and the Civil Surgeon on the 7th of March, the evidence, as taken down, does not appear to have been read over and explained to each witness, as required by Sections 198, 199, and 249 of the Code of Criminal Procedure.

Vol. VI. The Assistant Commissioner did not examine or put any questions to the accused, as he might have done under Section 202.

Before wholly discrediting the story told by the prosecutor on the ground of what are no doubt apparent discrepancies and inconsistencies in the evidence, the Assistant Commissioner should at least have ascertained for himself whether the accused denied it.

The evidence is taken down in a most careless and imperfect way. The attempt was made to get from each witness, other than the prosecutrix, the whole history of what he saw or professed to have seen. As regards most of the witnesses, a few words taken down in an illegible scrawl are all that we have to inform us what was the story which the witnesses could or would have told if properly questioned. In cases where a Judge sees that the evidence of the chief witness is entirely reliable, he would probably think it a waste of time to require others, called to corroborate his evidence by speaking to the same facts, to go through them in very minute detail. But it is a different matter when the evidence of the first witness is discredited, on the ground of discrepancy and improbability, and especially when a chief ground for discrediting his testimony is some apparent contradiction between it and that of the evidence of the other witnesses. The Assistant Commissioner was dealing with no mere fictitious case, but one in which death was indisputably caused by violence of some sort, and where the Assistant Commissioner could only acquit the accused by finding that the witnesses for the prosecution had made a false charge, and supported it by false evidence, under circumstances of the grossest criminality.

We do not propose to express any opinion on the evidence, but we certainly can attribute no value to any opinion formed by the Assistant Commissioner in so imperfect an enquiry.

On the 7th of March, the Assistant Commissioner records that he "dismissed the charge of hurt; he found that the accused did not commit hurt, acquitted him, and directed that he should be released."

The acquittal is wholly erroneous.

Section 250 of the Code of Criminal Procedure provides that, "when the evidence of the complainant and of the witnesses for the prosecution, and such examination of the accused person as the Magistrate shall consider necessary, have been taken, the Magistrate, if he should find that no offence has been proved

against the accused person, shall *discharge* him." This *discharge* is not an *acquittal*; it leaves the person discharged, and liable to be again charged at any time if fresh evidence should turn up, or other circumstances render such a course proper.

The Section goes on to provide that, if the Magistrate thinks the offence apparently proved, he is to draw up a charge.

By Section 251, this charge is to be read to the accused, and he is to be called on to make his defence to it. Upon this, the trial is to proceed regularly, and if the Magistrate finds the accused not guilty, he is to record a judgment of acquittal.

In the present case no charge in writing was drawn up, as provided by Section 250. The prisoner was not asked whether he was guilty or had any defence to make under Section 257.

The Assistant Commissioner could therefore only *discharge* him under Section 250, and not *acquit* under Section 255.

The Assistant Commissioner took no steps whatever to ascertain whether he had jurisdiction in respect of the person of the accused.

At the time of the passing of the 55 G. III. Cap. 155, the offence charged against the accused was *manslaughter* which was *felony*, and therefore does *not* fall within the description of "assault, forcible entry, or other injury, accompanied with force, not being felony," in Section 105 of that Statute.

If, therefore, the accused is a European British subject, the Assistant Commissioner had no jurisdiction to *try* him, and consequently could, of course, not acquit. Before assuming to deal with the case summarily, the Assistant Commissioner should have ascertained and recorded in his proceedings whether the accused person was or was not a European British subject, in order to determine whether he was subject to his jurisdiction or not. He should have enquired from the accused whether he alleged himself to be such or not, and, if necessary, should have proceeded to make further investigation in the manner pointed out in the Circular Order No. 2 of 1859, March 17th. But it is not necessary to direct enquiries upon this point now, because it is clear that, at the stage at which the proceedings had reached under Section 250, the Assistant Commissioner could not in any case have had power to acquit. We therefore quash so much of the Assistant Commissioner's order as acquits the accused.

The 25th June 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell, Judges.

False charge.

Queen *versus* Pran Kissen Bid.

Committed by the Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of instituting a false criminal charge with intent to injure.

It is not a sufficient ground for a charge under Section 211 of the Penal Code, that a person to whom a wrong has been done, or who conceives that a wrong has been done to him, makes a charge or complaint upon evidence, or a statement which is not or ought not to be sufficient to satisfy a reasonable mind, if in truth he did not know, at the time he made the complaint, that there was no just and lawful grounds for making it.

THE prisoner was charged, under Section 211 of the Penal Code, with having, on the 10th day of August last, with intent to cause injury to Kurpah Pundit, instituted a criminal prosecution against him on a false charge of having committed dacoity, knowing that there was no just or lawful ground for such a proceeding. The case was tried by Mr. Pigou, the Sessions Judge of Hooghly, who, on leaving the case to the Jury, told them that, if they believed that the prisoner had just and lawful ground for instituting the prosecution, they must acquit him, even if they believed the charge of dacoity to be false; but that, if the Jury believed that the prisoner knew that there were no just or lawful grounds for the charge, knowing that no dacoity had been committed and instituted the prosecution with intent to injure Kurpah Pundit in anger at any offence on the part of the villagers, then they must convict him. The first part of the direction to the Jury is open to some objection. The proper question to leave to the Jury would have been that, unless they believed that the prisoner knew that he had no just or lawful ground for instituting these proceedings, they must acquit him.

Throughout the summing up, the Sessions Judge appears to have gone through, and considered very carefully the evidence adduced by the prisoner to prove that the dacoity had been committed, and after show-

ing that there were grounds for supposing that the witnesses called by him were not speaking the truth, he told the Jury that, if the Jury believed that the witnesses speak the truth if they believed them, they must acquit the prisoner; but if they disbelieved them, they must consider whether the prisoner knew he had no just or lawful ground for instituting criminal proceedings. He said: "It is not enough that he (prisoner) was told by the witnesses. A man is not justified in making such a serious charge without careful enquiry. If the mere fact of being told by others is sufficient to justify a charge, there would be no safety against false charges; for a person would merely have to get another person to tell him a circumstance, and then he could make the false charge with impunity. No man, in making such serious charges, if the facts are not in his own knowledge, must be careful to make proper enquiry; and you must say whether this prisoner made any real enquiry."

Now, it is not enough, and not a sufficient ground for charging under Section 211 of the Indian Penal Code, that a person to whom a wrong has been done, or who conceives that a wrong has been done to him, makes a charge or complaint upon evidence or a statement which is not or ought not to be sufficient to satisfy a reasonable mind.

However rashly he may act in receiving and believing such statement if in fact and truth he does not know, at the time he makes the complaint, that there are no just and lawful grounds for making the complaint, he cannot be convicted of making a false charge under the above Section.

Looking at the whole facts of this particular case, we see no reason to suppose that the Jury were wrong in finding that the prisoner made the charge, knowing that there were no just or lawful grounds for such a proceeding.

The prisoner's vakeel has been unable to show us any circumstance which would lead to any inference other than that the defence which supports the false charge has been got up by the prisoner himself. There is nothing whatever which leads to the inference that the prisoner was misled by the story told by the witnesses called by him; and we think, therefore, that there is no necessity for interfering with the conviction, although the manner in which the question was left by the Sessions Judge to the Jury was not quite satisfactory.

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The 30th June 1866.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, Judges.

Grievous Hurt and Robbery.

Queen *versus* Chakor Haree and others.

Committed by the Magistrate of Bancoorah, and tried by the Sessions Judge of West Burdwan, on a charge of murder, &c.

Where, in a case of robbery attended with death, there was no intention of causing death or such bodily injury as was likely to cause death, the conviction was altered from voluntarily causing hurt in committing robbery, to voluntarily causing grievous hurt in committing robbery.

THESE four prisoners were committed to take their trial before the Sessions Court of Zillah West Burdwan on the following charges :-

1st. Murder (Section 302, Indian Penal Code).

and. Dacoity (Section 395, Indian Penal Code).

An additional charge was framed by the Sessions Judge, *namely*, robbery and voluntarily causing hurt.

The Sessions Judge, in concurrence with the opinion of the Assessors, convicts the prisoners of robbery, and voluntarily causing hurt in the commission of robbery, and sentences the prisoners to transportation for life (Section 394, Penal Code). The Judge observes that the evidence for the prosecution is particularly good and trustworthy, and proves that the deceased, with his wife, her babe, her brother, and her nephew, were returning at night from a neighbouring market with their little purchases, and a few brass and copper utensils, and that they were suddenly attacked on the road, and robbed of their all by the prisoners. The deceased received a blow on the head from a latee; the child also received a blow, but was not severely injured.

Bissoo the deceased died, says the Judge, "from the effects of the blow on the head, or rather of the shock occasioned thereby."

The Judge remarks that "in this case the deceased was struck but once, and with a *latee only*, and the intention of his assailants was evidently merely robbery, and they had no desire nor idea of causing death. Indeed, from the evidence of the medical officer, it appears the blow was by no means a severe one, and death may have been caused by the shock of an unexpected attack causing certain vessels of the brain to burst. The prisoners, therefore, cannot be found guilty of the capital charge."

The Judge, as stated above, convicts of voluntarily causing hurt in committing the offence of robbery under Section 394.

On turning to the evidence of the medical officer, we find that he deposes that there was a contused wound on the scalp two inches long and about a quarter of an inch deep, that the cut commenced a little above the forehead on the right side and ran backwards towards the crown of the head.

There was a considerable quantity of blood round the brain under the "*dura mater*." The effusion of blood was no doubt the cause of death. "This was probably caused by the shock of the blow which ruptured some of the small blood vessels of the brain." From this evidence it is very clear that the blow received by the deceased caused his death.

The prisoners have committed the grave offence of highway robbery at night upon unoffending people with whom it is clear from the evidence that they had no previous enmity. The evidence to prove an *alibi* on the part of the prisoners is wholly untrustworthy, and we entertain no doubt of the guilt of all the prisoners who have been clearly identified as present, and taking a part in the robbery.

The conviction of voluntarily causing hurt is, however, we think, not suited to the facts proved in evidence. The offence of hurt is described in the Penal Code, Section 319, as causing bodily pain, disease, or infirmity. In this case, a latee was used, the deceased was struck a heavy blow on the head, on a tender part of the head—the forehead—and this blow undoubtedly was the immediate cause of death, and not the shock occasioned by the blow, as observed by the Judge.

The Penal Code does not provide for simple cases of manslaughter, but it provides for cases of homicide; whereas, in the case before us, there has been no intention to cause death, or to cause such bodily injury as is likely to cause death, it falls under the head of grievous hurt (Section 325, Penal Code); and the practice of our Court has been to rely on this Section on such cases.

We therefore alter the conviction to "voluntarily causing grievous hurt in commission of robbery," and confirm the sentence passed by the Sessions Judge of transportation for life on Chakor and Brojo, who beat the deceased, as well as on the other two who are Chowkedars, and whose crime is aggravated by their position as guardians of the public peace.

The 30th June 1866.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges*.

Sentence without defence.

Criminal Jurisdiction.

Referred under Section 434, Act XXX. of 1861, and Circular Order, dated 15th July 1863, No. 18.

Bamaboistobee, *Petitioner*.

A sentence of imprisonment passed on a woman, who was never put on her defence, quashed as illegal.

We have referred to the Sections of the law quoted by the Sessions Judge and to the proceedings of the Magistrate, and we are of opinion that the sentence of one month's imprisonment passed under Section 182 of the Penal Code, in the case of Mussamut Bama, who was never put on her defence, is illegal.

The sentence is accordingly quashed.

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The 2nd July 1866.

Present :

The Hon'ble G. Loch, *Judge*.

Kidnapping.

Queen versus Sheikh Oozeer.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of kidnapping, &c.

Section 368 of the Penal Code refers to some other party who assists in concealing any person who has been kidnapped, and not to the kidnappers.

The Sessions Judge is right in supposing that the conviction by the Jury on the 3rd charge is incorrect. Section 368 evidently refers to some other party who assists in concealing any person who had been kidnapped, and does not refer to the kidnappers. As, however, the Jury have convicted the prisoner on the 1st and 2nd charges, and the prisoner has failed to show that there is any error in law in this finding or in the sentence passed upon him, I reject the appeal.

The 2nd July 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell, *Judges*.

Evidence of accomplices—Corroboration—Misdirection.

Queen vs. Khotub Sheikh and others,

Appellants.

Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of dacoity, &c.

A verdict of guilty of dacoity against certain of the prisoners set aside on the ground of misdirection, the Judge having omitted to point out to the Jury the danger of relying upon the uncorroborated testimony of accomplices.

In this case, the Sessions Judge has committed the error pointed out by the Court in the case of *Queen vs. Elahee Buksh*, 5 Weekly Reporter, p. 80, Criminal Rulings. He has omitted to point out to the Jury the danger of relying upon the uncorroborated testimony of accomplices.

As regards Khotub, a large quantity of property belonging to prosecutor was found in his possession. This fact raises a presumption of his guilt, and exactly tallies with what might have been expected if the evidence of the accomplices were true, and abundantly corroborates the statement that Khotub was concerned in the dacoity.

As regards the prisoners Sreemonto Sirdar, Tinoo Chung, and Nobin Sirdar, it is proved that they were absent from their houses, which are in the village of Chuprah, on the night of the dacoity. On the following morning at day-break they were met by three independent witnesses at Assumnugger, a place about four koss to the south-east of Chuprah, to which village they were apparently returning. By reference to the map, and from the evidence, Assumnugger appears to be about 3 or 3½ koss to the north-west of Bazeedpore. As traces of robbers and of the plundered property were found to the west of that village, it is clear that these people were in a place in which, if the story of the accomplices is true, they would naturally have passed on their return from the scene of the dacoity to their own houses. Their presence at Assumnugger is unaccounted for, except on the supposition that the story of the accomplices is true.

Acting on the rules laid down in *Elahee Buksh's* case, we think it unnecessary to interfere with the conviction of the above-mentioned four prisoners.

***ol. VI.** As regards Denoo Ghose, the finding of the pieces of burnt *masal*, with a sword, affords some slight corroboration.

As regards Modhoo Ghose, the finding of the silver ornament, which the prosecutor claims, in the possession of a member of the prisoner's family resident in his house, could afford some corroboration. But the Sessions Judge (disregarding the Circular of the 20th August 1864), instead of treating the possession of it as part of the evidence against the prisoner on the main charge, framed a separate charge in respect of the illegal possession under Section 412; and the manner in which the question on that charge was left to the Jury leaves it entirely doubtful whether or not they believed the ornament to be the property of the prosecutor.

As regards Woomesh Ghose, his absence from home on the night of the dacoity, and the circumstances referred to by the Sessions Judge, afford some slight corroboration of the story of the accomplice. It appears that the prisoner and Khodeeram have both houses in Kistapore. It may be that Khodeeram, knowing the fact that this prisoner had gone on the Saturday to Kishnaghur, to the Small Cause Court, worked that fact into his tale to give an apparent confirmation to it. It is a matter which should be left to the Jury whether or not, from the position of the parties, Khodeeram could have known that the prisoner went to Kishnaghur, and left it again that night, except from the statement of Woomesh Ghose given in the mode detailed by Khodeeram. It must be observed that Khodeeram does not deny that this prisoner's brother had given evidence against him in a case in which he was imprisoned for one year.

As regards Gungaram and Nobin Ghose, there appears to be really no corroboration; and the same observation appears to apply to Poteet Ghose, because, as we understand it, the Jury think that the *thal* found in his possession is not identified.

We dismiss the appeal as regards Sreemonto Sirdar, Nobin Sirdar, and Teenoo Chung.

As regards Khotub Sheikh, we dismiss the appeal as regards the charge of dacoity, but reverse the conviction upon the 2nd head of charge, *viz.*, that of dishonestly retaining stolen property, the possession of which he knew to have been acquired by dacoity.

And we direct that the verdict be set aside on the ground of misdirection, and a new trial had, as regards the remaining prisoners.

The 2nd July 1866.

Present :

The Hon'ble L. S. Jackson and W. Markby,
Judges.

Revision by High Court—Orders of Sessions Judge under Section 409, Code of Criminal Procedure—Security for good behaviour.

Miscellaneous Case.

Juswunt Singh, *Petitioner.*

Orders passed by Sessions Judges in confirmation of orders by Magistrates calling upon parties to give security for their good behaviour, though not subject to appeal, are open to revision by the High Court under Section 404, Code of Criminal Procedure.

With reference to Section 301 and 409, after the expiration of the term of confinement in default of security, a second security cannot be demanded except upon some new proof of bad livelihood or that a person is not capable of following an honest calling.

Jackson, J. (Markby J., concurring).

In this case, the petitioner appeals against an order of the Sessions Judge of Purneah, by which he has been directed to furnish security for his good behaviour in the sum of Rs. 2,000 for the period of three years; and, in default of furnishing security, he has been committed to prison. Section 409 of the Criminal Procedure Code provides an appeal against orders of Magistrates calling upon parties to give security for their good behaviour, such an appeal lying to the Court of Session to which the Magistrate is subordinate. Section 408, however, which allows appeals from persons convicted on trials held by a Court of Session to the Sudder Court, does not allow any appeal against an order of the present kind. But, undoubtedly, such orders passed by a Sessions Judge in confirmation of an order by a Magistrate are open to revision by this Court under Section 404 of the Code of Criminal Procedure.

It appears that the petitioner has been repeatedly convicted and imprisoned on various criminal charges, and it also appears that, when he was about to be released at the expiration of one of these periods of imprisonment, the Magistrate instituted an enquiry

into his character, and passed an order calling upon him to give security for a period of one year; and that order upon appeal was confirmed by the Sessions Judge of the District on the 29th September 1864. Under that order, the petitioner appears to have remained in prison. Just as that period was about to expire, the Magistrate commenced a second enquiry into his character, detaining the petitioner, it seems, in the meantime in custody. Having made a sufficient enquiry, he recorded an order on the 23rd October 1865 in the following terms: "This man is one of the most notorious dacoits in the district; he is a sort of Dick Turpin. Every one knows Juswunt Singh: it would be the height of folly to let him out of jail. Every Magistrate who has been here has taken care to keep Juswunt Singh in hand. The accused must find security in the sum of Rupees one thousand (1,000) for his good behaviour, for one year, from this date; in default, to remain in custody for the said period."

That order went before the Sessions judge. The Sessions Judge quashed it, and directed a further enquiry, on which the Magistrate took further proceedings. On the orders coming again before the Sessions judge, they were once more, and afterwards a third time, quashed, and the case remanded to the Magistrate. Finally, however, the Magistrate passed an order on the 23rd February of the present year, recommending that the petitioner should be called upon to furnish security in the sum of Rs. 5,000 for three years. In modification of that proposal, the Sessions Judge has passed the order now complained of.

By Section 301, Code of Criminal Procedure, which closely follows the Section under which the Sessions Judge's order appears to have been made, it is provided that, "in the event of any person required to give security under the provisions of the foregoing Sections failing to furnish the security so required, he shall be committed to prison until he furnish the same; provided that no party shall be kept in prison for a longer period than that for which the security has been required from him." And it appears that this Court, in the case of Sheikh Enayet, on the 29th July 1862, held that, "after the expiration of the term of confinement in default of security, a second security cannot be demanded except upon some new proof of bad livelihood, or that a person is not capable of following an honest calling."

Now, it appears that the Magistrate, being of opinion that it was "the height of folly" to allow this person to come out of custody and to be at large, has kept him in prison for a longer period than that for which the original security was required from him, and has made a second enquiry into his character, although that enquiry could only relate to the character of the petitioner during the period previous to his late incarceration. It could never have been intended that, under the operation of these Sections of the Code of Criminal Procedure, security should be time after time demanded from a party, so that, by renewed orders of that kind and without any chance of leading a new life, and showing himself to be a proper person to be left at large, he should be kept in prison for the whole period of his life.

It appears to me, therefore, that the order which the Magistrate and Sessions Judge have passed in this case is not in accordance with the law or with common justice. It may be very necessary for the peace of the district, if the prisoner be a person of the kind described, that he should be kept under close surveillance; that the police should keep an eye upon him, and narrowly observe his conduct.

It, upon being set at liberty, he should return to his former course of life, and show that he continues to be, after being set at liberty, a person of dangerous and desperate character, whom it is hazardous for the community to leave at large, no doubt he may again be brought before the Magistrate, and after evidence of his proceedings has been laid before the Magistrate, a further order may be passed requiring him to furnish security. It does not appear to me that, without having been set at liberty and allowed a fair chance of leading a new life, orders of this sort should be passed, one after the other. I think, therefore, that the order ought to be set aside, and that the prisoner ought to be released.

At the same time I observe that the Magistrate states that, on the occasion of the investigation into the prisoner's character, he appears to have used threatening language towards the witnesses who appeared to depose against him. It would have been a proper course for the Magistrate to call upon the petitioner to give security to keep the peace towards those persons, and it may now be a wise precaution for the Magistrate to do so before releasing the prisoner.

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The 7th July 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell,
Judges.

Forgery in Civil Court—Framing of charge.

Criminal Jurisdiction.

Referred under Section 434, Act XXV. of 1861, and Circular Order, dated 15th July 1863, No. 18.

Queen versus Mohesh Chunder Acharjee and another.

When a Civil Court sends a prisoner before a Magistrate on a charge of forgery, it is competent to the Magistrate to commit the prisoner for trial on a charge either of forgery, or of using as genuine a false document, or of abetting forgery.

ONE Becharam sued Mungla Dabea, the prisoners Mohesh Chunder and others, for possession of a tank. Mungla Dabea, in answer, alleged that the tank was sold by a deed, dated the 23rd Bhadro 1225, to one Boirop, and that the deed was in the possession of Mudoosoodun Kasaree as mortgagee. A summons was served upon Judoonath, the heir of Mudoosoodun, requiring him to produce the deed.

Judoonath filed a petition, Exhibit A, stating that the defendant had alleged that the deed of sale had been in pledge with his father Mudoosoodun, and prayed that it might be called for from the petitioner; that it was in reality with the petitioner's brother, Koylash Chunder, but that he had now obtained and filed it.

And accordingly he filed the deed, Exhibit B.

The Moonsiff examined Judoonath, and found that he knew nothing about the deed, and that it had been made over to him for the purpose of being filed by the prisoner, Mohesh Chunder Acharjee. He also examined Mohesh Chunder Acharjee. It appeared to the Moonsiff proved beyond all doubt, that the deed was a forgery, and that it had been fabricated by Mohesh Chunder. He accordingly forwarded the papers to Mr. Ryland, the Deputy Magistrate, under Sections 169 and 170 of the Code of Criminal Procedure, that he might proceed against Mohesh Chunder Acharjee under Sections 463, 196, and 193 of the Penal Code.

The Magistrate, apparently finding that there was no clear evidence that the deed had been actually forged by Mohesh Chunder himself, and consequently that it was doubtful whether he could be convicted under Sections 463 and 467, and also apparently finding in the course of the enquiry that there was ground for charging Nobin Chunder of abetting the offence, thinking that Mohesh Chunder should be charged under Sections 471 and 193, and Nobin Chunder as an abettor applied for the sanction of the Moonsiff. The Moonsiff informed the Magistrate that he might try the prisoners under whatever Sections of the Penal Code he considered proper.

The Magistrate committed Mohesh Chunder and Nobin Chunder on charges under Sections 471, 193, and 109.

We are unable to understand why the Sessions Judge did not at once try the charges in regular course.

We think that there is nothing in any of the objections which he takes to the regularity of the Magistrate's proceedings.

The Sessions Judge says he holds the commitment illegal for reasons which we shall discuss in detail.

First, that Sections 169 and 170 only give sanction to a charge to be entertained, and that, as no charge had been made by any prosecutor, the Magistrate was not competent to institute a charge himself. Section 68, which is quoted by the Sessions Judge, affords the most complete answer to this objection. It enables a Magistrate having such powers as Mr. Ryland possessed, except as is otherwise provided in Chapter XI., to take cognizance of any offence which may come to his knowledge in the same manner as if a complaint had been made against such person. Now, there is not a word in Sections 169 and 170 as to the person by whom the charge is to be made. And the Sessions Judge is in this dilemma, that, if his construction that "charge" in those Sections means charge by a private prosecutor, the Sections in question would only apply to private prosecutions, and not at all to a charge made by a Magistrate upon facts coming to his knowledge.

Secondly, he says that the Moonsiff's giving sanction to the prosecution of the two prisoners is mere waste paper, and did not give the Magistrate jurisdiction to investigate and commit; because, if it is an order under Section 171, the particular charge must first be determined by the Moonsiff, and he had

no power under Section 171 to order generally the trial of any charge under the Penal Code which the Deputy Magistrate, and not the Moonsiff, may consider correct.

The Moonsiff in terms made his order under Sections 169 and 170, and the answer we have given to the first objection shews that, in our opinion, it was a perfectly good order under Section 170.

But we must express our dissent from the narrow construction which the Sessions Judge would put on the word "charge" in the 171st Section. The charge before the Magistrate is something very different from the *formal written instrument of charge* to be drawn up under Section 233, upon which the prisoner is to be tried before the Sessions Judge. When a prisoner is sent by the Judge of a Civil Court before the Magistrate on a charge of forgery, it is perfectly competent to the Magistrate to send him for trial on a charge either of forgery, of using the document knowing it to be forged, or of abetting forgery. In fact, for the exact offence which, on a full investigation before the Magistrate, shall appear to have been committed, we need not enquire whether the express sanction of the Civil Court to the charge as ultimately framed by the Magistrate is requisite, because such sanction was actually given in the present case.

Thirdly, as to the charge against Mohesh Chunder of fabricating false evidence under Section 193, the Sessions Judge raises a discussion which appears to us to be beside the question, *viz.*, whether the Petition A was a document within the meaning of that word in Section 29. It may or may not be. On that point we need at present express no opinion.

As we understand it, the petition was a document, instrument, or writing fabricated, to have evidence upon which the Court was to act to excuse or explain the non-production of the mortgage-deed at an earlier period, or to give the mortgage-deed an appearance of genuineness by shewing that it came from natural and proper custody. On trying the case, the Sessions Judge will, no doubt, be able to ascertain whether it was intended to be used as evidence. Whether or not it is a document in the sense in which that word is used in Section 29 and in the Penal Code, is probably very immaterial.

We think that there is no ground for interfering with the commitment, and that it was the duty of the Sessions Judge to have tried the prisoners in regular course.

The 9th July 1866.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble J. P. Norman, F. B. Kemp, W. S. Seton-Karr, and G. Campbell, *Judges*.

Evidence (of wife).

Criminal Referred Jurisdiction.

Queen *versus* Khyroollah and others.

This case was referred to a Full Bench by Norman and Campbell, JJ., with the following orders :—

Held by the majority of the Court (Norman, J., dissenting) that, upon trials in the *Mofussil*, a wife is competent to give evidence for or against her husband, or for or against any person tried jointly with her husband.

Norman, J.—I AM of opinion that there ought to be a new trial as regards the prisoners Khyroollah, Ainooddeen, and Shahabuddin.

According to the cases 1 Nizamut Adawlut Report, page 182, and Reg. *versus* Noyandee and Shodee, decided by Mr. Justice Steer and Mr. Justice L. S. Jackson in this Court, on the 9th of September 1863—the Queen *versus* Gour Chand Polie, 1 Weekly Reporter, Criminal Rulings, page 17—the evidence of a wife is not admissible for or against her husband or against a prisoner charged jointly with him.

No doubt, there are cases in the late Sudder Court in which the rule was not acted upon; and, as the question is one of very great importance, I think that the opinion of a Full Bench should be expressed on the subject.

The deposition of the witness Biroza, taken before the Magistrate, was read before the Judge. The Judge says: "She being an old woman, and reported to be dying of cholera, cannot attend to depose in Court."

But it does not appear that the Judge took any proper steps, by the examination of any witness, or by requiring the production of a medical certificate, to satisfy himself,

Or. 40.

Vol. VI. as required by Section 369, that her attendance could not be procured. There is a special reason why the Judge ought to have been peculiarly cautious on this point in the present case, because the witness Sumshoodeen, a little boy, the grandson of the old woman, who before the Magistrate stated that he was present and witnessed the murder, describing it almost in the same language as the witnesses Afzan and Nawabjan, when before the Judge, denied all knowledge of it, and said his mother told him about it the day after the deceased was killed. Afzan, the wife, who, according to her own account, stood by for twenty minutes while her husband was slowly dying by the hands of her paramours, is an actress whose evidence must be received with great caution.

The Police Officers have not been called, although their evidence would have been of the greatest importance.

Although the wives of the prisoners are not, according to my present impression, admissible witnesses against their husbands, or the supposed accomplices of their husbands standing on their trial at the same time, it would be a most important thing to show how and when the statements were made by them which led to the discovery of the several places in which the body of the deceased had successively been deposited.

Campbell, J.—As it appears that there are some expressions of some Judges which may possibly give rise to doubt respecting the admissibility of the evidence (notwithstanding all the authority on the other side), I have no objection to the reference to a Full Bench.

JUDGMENTS OF THE FULL BENCH.

Peacock, C.J.—Two questions have been referred in this case—

1st. Whether, upon a trial in the Mofussil of a person charged with an offence, his wife is competent to give evidence for or against him.

2nd. Whether, upon a trial in the Mofussil of several persons charged jointly with an offence, the wife of one of them is competent to give evidence for or against the others.

I am of opinion that both of these questions must be answered in the affirmative.

It is a general rule of English Law, subject to certain exceptions, that in criminal

cases a husband and wife are not competent to give evidence for or against each other. But the English Law is not the law of the Mofussil.

At the date of the grant of the Dewanny to the East India Company in 1765, when the Civil Government of the Provinces of Bengal, Behar, and Orissa was vested in the East India Company, the Mahomedan Law was the Criminal Law of the country. That law was not abrogated on the accession of the British Government, and for some years afterwards the administration of justice in criminal cases was left to the Nazim. Even after the Criminal Law was administered by the Courts of the East India Company without reference to the Nazim, the Mahomedan Law, as modified by the Regulations and Acts of Government, continued to be the general Criminal Law of the country. The proceedings of the Criminal Courts were regulated by the Futwas or opinions of their Mahomedan Law Officers, and it was expressly enacted by Section 4, Regulation IX. of 1793, that the sentences of the Nizamut Adawlut should be regulated by the Mahomedan Law, excepting in cases in which a deviation from it was expressly directed by any Regulation passed by the Governor-General in Council.

In some cases, provision was made with reference to the Futwas to be given by the Law Officers in cases in which the evidence given on a trial would be deemed incompetent by the Mahomedan Law. For example, Section 56, Regulation IX. of 1793, enacted that "the religious persuasions of witnesses shall not be considered as a bar to the conviction or condemnation of a prisoner; but in cases in which the evidence given on a trial would be deemed incompetent by the Mahomedan Law, solely on the ground of the persons giving such evidence not professing the Mahomedan religion, the Law Officers of the Courts of Circuit are required to declare what would have been their Futwa, supposing such witnesses had been Mahomedans. The Courts of Circuit are not to pass sentence in such cases, but shall transmit the record of the trial, with the Futwa directed to be required from the Law Officers, to the Nizamut Adawlut, which Court, provided they approve of the proceedings held on the trial, shall pass such sentence as they would have passed had the witnesses whose testimony may be so deemed incompetent been of the Mahomedan persuasion."

Further, by Regulation III. of 1810, which authorized the Government to dispense with the attendance and Futwa of the Law Officers whenever there might appear to be sufficient cause, it was enacted that, "in the event of any question of Mahomedan Law arising upon such trials, the same should be recorded upon the proceedings for the information and decision of the Court of Nizamut Adawlut; but, if the question should refer to the competency of a witness, such witness should be examined, leaving the admission or ultimate rejection of the testimony so given to the consideration of the Nizamut Adawlut."

Other modifications of the Mahomedan Criminal Law were made, and in some instances particular offences, such as perjury and forgery, &c., were defined, and the punishment for them declared by Regulations of Government (*see* Regulation II., 1807, and Regulation XVII., 1817).

In 1832, by Regulation VI., Section 5, it was enacted that any person not professing the Mahomedan faith, when brought to trial or commitment for an offence cognizable under the general regulations, might claim to be exempted from trial under the provisions of the Mahomedan Criminal Code; and in such cases the prisoner was to be tried with the assistance of a Punchait, Assessors, or a Jury, and the Futwa of the Law Officer was to be dispensed with.

It is clear that the English Criminal Law was not the Criminal Law of the Mofussil, and that the English Law of Evidence was never extended by any Regulation of Government to criminal trials there.

Section 3, Act XV. of 1852, did not render a husband or wife incompetent for or against the other in criminal cases. It merely declared that nothing in the Act should render them competent.

Act II. of 1855 did not affect the matter now under consideration. It is clear that Section 14 did not render a wife competent to give evidence against her husband in a criminal case. It declared that the persons therein mentioned only should be incompetent to give evidence. It rendered them incompetent in all cases, but it did not render any person competent or incompetent with reference to particular persons or particular cases. Section 20 applied to civil proceedings only, and Section 58 declared that the Act was not to be so construed as to render inadmissible in any Court any evi-

dence which, but for the passing of the Act, would have been admissible in such Court.

It should be observed that, at the time when Acts XV. of 1852 and II. of 1855 were passed, the Mahomedan Criminal Law, as modified by the Regulations, was the general Criminal Law of the country. As a general rule, women were incompetent witnesses under the Mahomedan Law in criminal cases (2 Hedaya, page 667).

Mr. Beaufort, in his Digest, Volume I., page 118, para. 629, limits the rule which excludes the evidence of women to cases inducing Hudd or Kisas; but he does not cite any authority for that position.

Zibra says: "In the time of the Prophet and his two immediate successors, it was an invariable rule to exclude the evidence of women in all cases inducing punishment or retaliation" (2 Hedaya, 667). In Hurrah's case, 1 Macnaghten's Nizamut Adawlut Cases, it was held that the evidence of a wife or son was insufficient for a sentence of Kisas, but sufficient for conviction on strong presumption and a sentence by seasut.

In Mussamut Mughnee *versus* Ohariya, 1 Nizamut Adawlut Reports, 144, the evidence of the prisoner's wife was admitted in corroboration of other evidence against him to support a sentence of death or other punishment by seasut.

In 2 Nizamut Adawlut Reports for 1852, page 156, Mr. Mills, in a case of culpable homicide, says: "Though the testimony of a wife against her husband may be received in our Courts, yet the practice of summoning a wife to give evidence against her husband has been always held to be objectionable, and it is one which should on no account be encouraged."

In 2 Macnaghten's Nizamut Adawlut Reports, 150, the Court observed: "The wife of the prisoner was called to give evidence against him though her evidence was wholly unnecessary; the practice of summoning such a near relation to the prisoner as a witness for the prosecution, *excepting in cases of urgent necessity, was considered highly objectionable*; and the Court directed that such a practice should be discouraged."

In 3 Macnaghten's Reports, it was held, contrary to the Futwas of all the Law Officers, that the evidence of a son was admissible against his father in a criminal case.

But it is not necessary to allude further to these cases except to show that it was

Vol. VI. the practice of the Nizamut Adawlut to admit the evidence of a wife against her husband, or a son against his father, in criminal cases in which the sentence was by seasut. I do not, however, place much reliance on those cases, as they were decided under a very different system of law from that which now exists. Still they show that, at that time, the evidence of a wife was legally admissible. The Mahomedan Criminal Law, including the Mahomedan Law of Evidence, is no longer the law of the country. It has been superseded by the Penal Code and the Code of Criminal Procedure so far as they go; but they do not touch upon the rules of evidence. After the passing of the Penal Code and the Code of Criminal Procedure, Regulation IX. of 1793, by which the Mahomedan Law, as modified by the Regulations, was established as the general Criminal Law of the country, and many other Regulations bearing upon the same subject, were repealed by Act XVII. of 1862. A Code of Evidence has not yet been passed, and we have no express rule laid down by the Legislature in any existing laws upon the subject now under consideration.

By the abolition of the Mahomedan Law, the Law of England was not established in its place.

I know, therefore, of no law which renders a husband or wife incompetent to give evidence against the other, or which excludes the evidence of others who are bound by the closest ties of relationship.

It has, however, been held by a Division Court that the evidence of a wife is not admissible against her husband in a criminal case, even in corroboration of other evidence given (Gour Chand Polie and Dwarkee Polie, 1 Weekly Reporter, Rulings in Criminal Cases, 17).

In that case, the Judges say: "We think that the evidence of the wife against her husband should not have been recorded. It is true that there are cases published in the earlier Reports of the Nizamut Adawlut in which the evidence of the wife has been received against the husband in corroboration of other evidence; but this practice has been reprobated by later decisions of the same Court, and is certainly opposed to the general principle of all criminal law. The Judge has quoted Section 20, Act II. of 1855; but this Section refers to civil proceedings. The Judge would hardly condemn a wife who committed perjury for her husband, and, on the other hand, he would most likely discredit her if she

"appeared too willing a witness against her husband."

With reference to that part of the judgment in which it is said that the practice had been reprobated in later decisions, I would remark that it was merely the practice of compelling a wife to give evidence against her husband when her evidence was not necessary, that was reprobated, and that it is to be inferred that the evidence is admissible although the attendance of a wife against her husband ought not to be compelled when not necessary. In this I entirely concur.

It is our duty to declare what the law is, not to make the law—or, as Lord Bacon expresses it, "*jus dicere*," not "*jus dare*." If Judges were at liberty to decide what the law is according to their notions of public policy, the greatest confusion and uncertainty would necessarily be caused. It is not for us to say whether the rule of English Law is founded upon sound principles or not, although there are many eminent jurists who consider that it is not. But I may say that I cannot concur in the proposition enunciated in the case last cited, that it is contrary to the general principle of all Criminal Law to admit the evidence of a wife in corroboration of other evidence against her husband.

When the Judges of the Nizamut Adawlut spoke of a wife giving evidence in corroboration of other testimony against her husband, they no doubt had reference to the Mahomedan Law, which did not allow a conviction upon the evidence of only one witness; and, I presume, the Judges of the Division Bench, who in the case last cited rejected the evidence of a wife in corroboration, would also reject it where the wife's evidence is uncorroborated. They do not allude to the exception in the English Law by which a wife is competent to give evidence against her husband upon a charge of personal violence committed by him upon her, but I presume that they would admit of that exception.

Bentham, speaking of the rule of English Law which excludes the evidence of a wife against her husband, says:—

"A law which should exclude the evidence of the wife in the case of a prosecution against her husband for ill-usage done to the wife, would be tantamount to authorizing the husband to inflict on the wife all imaginable cruelties so long as nobody else was present—a condition which, having by law the command in and over his

"own house, it would in general be in his power to fulfil.

"A law which excludes the testimony of the wife in the case of a prosecution against the husband for mischief done to any other individual or to the State is, in like manner, in other words, a law authorizing him to do, in the presence and with the assistance of the wife, every kind of mischief, that excepted by which she would be a sufferer. The law which in the former case affords its protection to the wife—with what consistency can it, in the latter case, refuse its protection to every human creature besides?" See Bentham's Works by Bowring, Volume VII., page 484.

"Two men both married are guilty of errors of exactly the same sort, punishable with exactly the same punishment. In one of the two instances (so it happens), evidence sufficient for conviction is obtainable, without having recourse to the testimony of the wife; in the other instance, not without having recourse to the testimony of the wife. While the one suffers—capitally, if such be the punishment—to what use, with what consistency, is the other to be permitted to triumph in impunity?" *Idem*.

If these arguments are not sufficient to shew that the rule of exclusion in England is merely a rule of positive law, and not one depending upon the fundamental principles of natural justice, I would adopt the arguments of the eminent and highly distinguished jurist, Mr. Livingstone. In his Introductory Report to the Code of Evidence, prepared by him for the State of Louisiana, he says: "The exclusion of interested testimony having been examined and found to be injurious to the investigation of truth, and its admission to be attended with no inconvenience which may not be reduced to one of a quantity that has no assignable value, it, of course, finds no place in the proposed Code; and with it disappears one of the most fruitful sources of uncertainty, expense, delay, and inconvenience in the law.

"If the search after truth requires that interested witnesses, and even the parties themselves, should be interrogated to discover it, are there any relations in which the offered witness may stand to the parties that exclude his testimony? By the English Law—and, of course, in the several cases which have been noticed by ours—there are several: husband and wife, &c.

"1. The Code now offered does not contain the exclusion of husband or wife, as witnesses, for or against each other; because the reporter does not find any one sufficient among the reasons by which it is supported in the English Decisions or Commentaries. The first of these alleged reasons is that their interests are identical."

* 2 Starkie 706.
1 Bl. 443.

"But in a system which discards interest as an object-

tion to competency, this reason falls of course. The second is said by the same authority to be 'on grounds of public policy' to prevent distrust and dissension between them, and to guard against perjury."

"In the case before us, the public evils are designated: first, the danger of domestic dissension; secondly, the danger of perjury. The first, if the evidence should be against the party connected with the witness; the second, if it should go to exonerate him. The argument supposes that if the husband or wife be called as a witness in a suit to which the other is a party, one of two things must happen; either unfavorable truths will be told, which it is said will disturb the family peace; or perjury will be committed to preserve it. Now, these are two opposite and contradictory reasons. If the danger be that family dissensions will grow out of the testimony, then that of perjury is avoided; if the danger be perjury, then that of family dissension need not be apprehended. But legislation must be founded on the general application of its reasons—not on the tendency of its measures to good or evil in particular instances. If the connection by marriage be so close as to make the parties incur the danger and disgrace of giving false testimony for the other, then let the case be examined solely with a view to the evil of placing the witness in a situation where strong motives are offered to him to commit a crime. If the predominant risk be that of destroying domestic harmony, let that be assigned as the reason; but to allege both, when they are contradictory, is a strong presumption that neither can safely be relied upon. Both, however, will be examined, and both contrasted with the evils which attended the exclusion.

"First, let us suppose that domestic dissension is the danger—that is to say, that one spouse will quarrel with the other for telling the truth in a Court of Justice when it makes against the interest of the other. But, in most cases, the interest is common

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"between them ; therefore, there is little
 "probability that any ill-will can be
 "created in the mind of the one against the
 "other for not committing perjury, in
 "order to protect a common interest. The
 "supposition that a domestic broil may
 "ensue from a cause like this, is to suppose
 "the party raising it, corrupt in expecting
 "falsehood from his or her spouse, and
 "malevolent in resenting his disappoint-
 "ment ; and the law cannot reasonably be
 "required to make any great sacrifice for
 "preserving the harmony of so ill-assorted
 "a union as that which such a case sup-
 "poses. The dissension arises from the
 "performance of a duty—bearing open
 "testimony of the truth, and avoiding a crime
 "—the commission of perjury ; and because
 "a brutal, corrupt, or passionate husband
 "may quarrel with his wife for avoiding
 "the crime, shall the law declare that the
 "wife shall not perform the duty ? It
 "will watch over domestic peace by punish-
 "ing those that disturb it, and for proper
 "causes, by dissolving the bond of an ill-
 "assorted connexion ; but it ought never
 "to say, the one party shall be exempted
 "from the performance of an important
 "public duty, because the other is tyrannical
 "and unjust. The argument supposes, too,
 "that there is greater danger to domestic
 "happiness from this than from any other
 "source ; but is there any foundation for
 "the belief ? Not one case in a thousand,
 "it is believed, will occur in practice where
 "any improper excitement will be created
 "by an adherence to the truth, although it
 "should militate against the wife or the hus-
 "band of the party who states it. Why
 "should it more in this case than in that of
 "any other witnesses ? Mutual affection, the
 "knowledge that it was the performance
 "of a duty required by law, and that it
 "could only be avoided by a crime, are so
 "many and such cogent reasons to prevent
 "ill-will on the occasion, that it is astonish-
 "ing how this reason could find favor with
 "the great lawyers who have assigned it
 "as an argument in favor of their rule ;
 "more especially when they themselves
 "most explicitly discard this reason by
 "declaring that the wife shall not be allow-
 "ed to appear as a witness against the hus-
 "band, even if he consents, or after a divorce,
 "nor against the interest of his heirs after

2 Stark 706.

6 East. 192.

"his death.* How con-

"nubial happiness can

"be disturbed by a

"compliance on the part of the wife with

"her husband's request while united, or by
 "any act after the connexion has been dis-
 "solved by death or divorce, these learned
 "Doctors of the law alone can explain.

"Examine the opposite reason—the dan-
 "ger of perjury ; that is to say, the matri-
 "monial union is so strict that the one
 "party to it will incur all the dangers of
 "punishment and infamy rather than tell the
 "truth when it is injurious to the other ;
 "and the law, it is said, holds out this ir-
 "resistible temptation to the witness when
 "it permits him to be examined. Yet, by
 "the preceding argument, the temptation
 "is easily resisted, the truth will be told,
 "and this strong connexion is so weak
 "that it is broken merely on that account.

"But the arguments must be destroyed,
 "not by opposing the one to the other,
 "but both of them to the truth. There
 "is no doubt that in this, as in many other
 "cases, minds may be found that will
 "waver between the declaration of a truth
 "that may hurt their interests or their
 "feelings, and the assertion of a falsehood
 "that in their opinion may secure
 "both from injury ; but can the law
 "be said to hold out a temptation to perjury
 "when it orders a party under those circum-
 "stances to tell the truth ? If there were no
 "temptations to conceal the truth or assert a
 "falsehood, there would be no need of oaths.
 "(Oaths, and the penalties for breaking
 "them, were made for the purpose of coun-
 "teracting that disposition. If they were to
 "be dispensed with in cases where that dis-
 "position exists, there would be no need for
 "them in any others. In every such case,
 "then, it may, with equal reason, be said
 "that the law holds out a temptation to
 "perjury, because it exacts the oath to tell
 "the truth, when there is an inclination
 "to conceal it ; and the argument would
 "extend with equal reason to the abolition
 "of oaths, and the penalties for the breach
 "of them. This exclusion is at variance,
 "too, with other provisions of the law as
 "they already exist. The party himself
 "may be interrogated in Chancery in Eng-
 "land, and in all cases at law here. The
 "wife may be interrogated to support an
 "accusation made by herself against her
 "husband for a personal injury, in some
 "cases affecting his life ; yet she is not
 "permitted to prove a fact that would save
 "him from an ignominious death on a
 "charge brought against him by another.
 "Now, in all these cases, the danger of per-
 "jury is equally great, or greater, unless we

"suppose the attachment of a wife to her husband's interest superior to his own, or her desire to make good her own charge less intense than that which she would feel to support the accusation brought by another. The danger of perjury is no greater in this than in other cases in which it is incurred without scruple in the dearest connexions of nature—father and son, mother and child, brother and sister, friendships of the most intimate kind, habits of intimacy during a long life—the parties to all these are every day arrayed for and against each other as witnesses, and the law interposes no other safeguard to their consciences than its penalties and the danger of infamy by detection. No rule of exclusion protects the witness against the influence of his affections or his interests. He is heard, and the degree of connexion is weighed against his character and the probability of his story; the Counsel cross-examine; the public inspect; the Jury interrogate, and calculate, and determine; and no inconvenience is felt in those cases. Why should there be in this?

"Having stated the general principle that every party to a suit has a right to all the information in relation to his cause, of which he ought not to be deprived but for reasons of great public or private inconvenience, and examined, by discussing the reasons for exclusion in this case, whether it offers any such inconvenience, let us now examine the particular evils attached to the rule as it now stands.

"In criminal cases, the evil is most apparent. Suppose the husband, accused by positive, but perjured testimony, of a crime affecting his life, and the wife the only witness of a fact that would prove his innocence, no matter what circumstances she could adduce to corroborate her testimony; no matter what intrinsic evidence it contained; no matter what perfect conviction it would produce of its truth, it is sternly excluded; and the innocent husband is executed because *"public policy requires that the peace of families should not be disturbed, and that no temptations should be held out to perjury."* In this case—by no means an improbable one—there is positive evil, cruel injustice, heart-rending distress; in the case which the law attempts to guard against, inconvenience only, if it occurs—but an inconvenience highly improbable

"to happen, inasmuch as it is supposed to affect domestic union, and, as it is believed to be a temptation to perjury, not one strong enough to produce the effect, or should it be yielded to, would be capable of detection by the usual means. But even without supposing the extreme case of life or death, *the suppression of testimony is in all cases an evil; and the law deprives a party of a certain right to avoid a problematical inconvenience.*

"On the other hand, suppose the testimony of the wife necessary to procure the conviction of the husband; she is the only witness to a murder he has committed. This I consider the strongest ground for the exclusion; it enlists the feelings, and they are most frequently found on the right side. Shall a wife be forced to give testimony that will condemn her husband, the father of her children, to infamy and death, or take refuge in the crime of perjury to avoid it? I confess that, if the alternative could be avoided, a humane lawgiver would not enjoin it; but if sympathy for individual distress should not be entirely rejected, it ought never to be entertained when its indulgence would lead to more extensive injuries to the community. A wise and provident legislator must have the consequences of every legal provision as present to his mind as its immediate operation is to his senses; and in applying this rule to the subject under consideration, he should not, in tenderness to the feelings of conjugal affection, permit the husband or wife to escape punishment for a crime, or defraud another of his right, by declaring that the only witness of the offence or the wrong shall not be heard. Some crimes cannot be perpetrated without the aid of an accomplice. The accomplice may betray the principals. The fear of this treachery, in many instances, may prevent the crime; or a person may not be found willing to engage in the enterprise. But, by the rule of exclusion, the law furnishes an assistant who can never betray, and one who is always at hand; and thus gives a facility to the commission of offences which no other circumstance could possibly offer. Besides, public justice requires, and common sense would seem to point out, that those persons who are the most likely to be acquainted with the fact should be first called on to prove it. But who so probable to know the guilt or innocence of the party accused as the compa-

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"tion of all his hours, the depository of his
"most secret thoughts; and what better cal-
"culated to prevent an intended crime, than
"the knowledge that those from whom it
"is so difficult to conceal it may be
"made the unwilling witness of its dis-
"closure? Precisely in the proportion that
"a man would be encouraged to commit a
"crime by the knowledge that the person
"to whom he finds it necessary to confide
"it cannot become a witness against him,
"will be his fear of committing it, when
"he knows that there is no person in whom
"he may confide, that may not be forced or
"be willing to betray him.

"So sensible of this have been the judi-
"cial lawgivers of England, that they have
"imposed no bar to the receiving the testi-
"mony of father and son, mother and
"daughter, brother and sister, and all the
"other relations of consanguinity or affin-
"ity. They have had no regard to the con-
"fidences of friendship, and have thought
"that the affections of nature, as well as
"those of habit and sympathetic feeling,
"should afford no obstacle to the attain-
"ment of the ends of public justice. They
"have gone farther, and made an excep-
"tion to the rule which they laid down as
"one inviolable, even by consent,* in the

* 2 Starkies 706. Rep.
Temp. Hard. 264.

case of husband and
wife; and, as we
have seen, have al-
lowed the wife to be produced as a wit-
ness against the husband on a prosecution
for an injury done to herself. Now,
mark the reason! It is a convenient and
a ready one; from the '*necessity of the
case*;' which must mean, if it mean, any-
thing, that there is a necessity that crimes
should be punished, and that, unless the
testimony of the wife were admitted, they
would, in those instances, be unpunished.
Now, admit this reasoning, and see whe-
ther it does not go to the utter destruc-
tion of the rule to which it is offered as
an exception. There is no greater neces-
sity for punishing a crime committed by
the husband against his wife, than there
is for punishing the same crime committed
by him against another; and if the wife is
the only witness that can convict in the
last case, her testimony is as necessary
as it is in the first, and, being necessary
in both, it should not be admitted in one,
and excluded in the other. But, in truth,
the enquiry is never made, and in this,
and in all the other cases founded on
the convenient argument of necessity,

"although there may have been twenty
"other witnesses present, the pretended
"necessary witness it admitted; and al-
"though there may be none but him com-
"versant of the fact, he is rejected where
"it has not yet been deemed convenient
"to admit the argument of necessity.

"The advantages of receiving testimony
"from this source so greatly overbalance
"its evils and the inconveniences, and the
"injustice of rejecting it are so manifest,
"that I have not hesitated to give this ex-
"clusion no place in the Code." (Page 271).

In France, according to Art. 322 of the
Code D'Instruction Criminelle, a husband
and wife, and other specified relations, if
objected to by the accused or by the Pro-
cureur-General, cannot be a witness for or
against one another, but the President may
summon and examine any person, whether
such person is comprised in Art. 322 or
not. (See Art. 269.) The witness in that
case is not examined on oath. These are
matters of detail to be provided for, if at all,
by an express law, and not by rules to be
laid down by Judges.

But even if the rule of English Law is
founded upon sound and just principles
with reference to the state of society in
England, it appears to me to be wholly
inapplicable to the natives of this country,
and to their social institutions and rela-
tions. A law which may be politic and
just in a Christian country in which a man
is prohibited from having more than one
wife, and a woman from having more than
one husband, may be wholly inapplicable
to a country in which polygamy is allowed.
Can the legal fiction that a man and his
wife are one person, apply to a Koolin
Brahmin and his 50 wives, or to a
woman in Malabar and her several hus-
bands. Or, should the evidence of one of
50 wives against her husband be excluded
lest it should cause dissension in the family?
A law which should allow a wife to give
evidence against her husband in a case of
personal injury committed upon her, and
would not allow her evidence to be either
corroborated or contradicted by other wives
who were present at the time, would appear
to me not to be founded upon the soundest
principles either of policy or justice. It
would be obligatory upon the Judges to
allow a wife to give evidence against her
husband upon a charge of an assault com-
mitted by him upon her, and to exclude her
from testifying a charge against him of
murdering their infant child when no one

was present but themselves. Or, would it be just to allow from necessity a wife to give evidence against her husband upon a charge of personal violence committed by him upon her, and to refuse the evidence of another wife on his behalf? If we had to decide this case upon our own notions of policy, I should admit the evidence of the wife, and leave the Court to judge of her credibility as in all other cases: but even if my own opinion were against the policy of admitting such evidence, I should not feel justified in rejecting the evidence of a wife who was the only witness to the murder of her child by her husband, or in rejecting the evidence of a wife as a witness for her husband on a charge of a capital crime preferred against him by one who admits that no one was present when the alleged crime was committed except the accuser, the husband, and his wife.

In the case of European British subjects who are governed by the law of England, we must administer that law. But in the Mofussil, where the law of England is not the law of the country, I consider that I should not be justified in excluding any witness who was not clearly incompetent by law. *Prima facie* every one is competent and bound to give evidence, and every one who is charged with a crime is entitled to adduce on his behalf the evidence of any witness who can throw light upon the facts in dispute, and who is not expressly declared by the law to be incompetent. Would any Judge, unless bound by the clearest and most indisputable rule of law, condemn a prisoner to death for murder upon the evidence of the wife of another man, and, upon his own notion of public policy, reject the testimony of the prisoner's own wife in his favor? Would he do so, if it were proved that the three persons in question were the only persons present at the alleged murder, or that the husband of the witness was also present, and that he had fled? We cannot import one portion of the English Law and reject the remainder without taking upon ourselves the duty of legislators. I think that the evidence of the wife is admissible in both cases, because I do not find any law of this country which expressly provides against it. The degree of weight to be attached to the evidence in such cases must, as in every other case, be determined by those who have to decide upon it.

It appears from a late edition of Mr. Norton's book upon Evidence, that the Court

of Fouzdaree at Madras sentenced a man to death who was found guilty of murder upon the sole evidence of his own wife. (5 Ed., page 41).

There is also, I believe, a ruling of the Nizamut Adawlut at Agra to the same effect. The case in Madras appears to have arisen in Malabar, where a woman has a plurality of husbands. I have not been able to refer to either of the two cases.

The case should go back to the Division Bench by which it was referred, with the expression of our opinion.

Norman, J. I regret that I am compelled to differ from the rest of the Court.

In order to explain my views, it is necessary that I should go into the history of this question.

Regulation IX. of 1793 made provision for the trial of persons charged with crimes or misdemeanors. Section 47 enacts:—“The charge against the prisoner, his confession (which is always to be received with circumspection and tenderness) if he plead guilty, or, if he plead not guilty, the evidence on the part of the prosecutor, the prisoner's defence, and any evidence which he may have to adduce, being all heard before him, the Caze and Mufti (who are to be present during the whole of the trial) are to write at the end of the record of their proceedings the futwa or law as applicable to the circumstances of the case, and to attest it with their seals and signatures. The Court shall attentively consider such futwa, and if it shall appear to them consonant to natural justice, and also conformable to Mahomedan Law, they are to pass sentence in terms of the futwa,” &c.

By Section 54 it is enacted—“The Judges of the Court of Circuit are to refer to the Caze and Mufti of their respective Courts all questions on points of law that may arise during the course of any trial, and respecting which no specific rules shall have been enacted by the Governor-General in Council, and shall regulate their proceedings by the opinions which may be delivered by those officers. If such opinions shall appear to the Judges contrary to the principles of natural justice, or to the Mahomedan Law, they are nevertheless to be guided by them, and after completing the trial, and obtaining the futwa of the law officers upon the case, they shall, without passing sentence upon it, transmit the proceedings and futwa to the Nizamut Adawlut, with a separate letter

Vol. VI. "stating their objections to such opinions or futwa, and wait the sentence of the Court."

By Section 56: "In cases in which the evidence given on a trial would be deemed incompetent by the Mahomedan Law, solely on the ground of the persons giving such evidence not professing the Mahomedan religion, the law officers of the Courts of Circuit are to be required to declare what would have been their futwa, supposing such witnesses had been Mahomedans. The Courts of Circuit are not to pass sentence in such cases, but shall transmit the record of the trial, with the futwa directed to be required from the law officers, to the Nizamut Adawlut, which Court, provided they approve of the proceedings held on the trial, shall pass such sentence as they would have passed had the witnesses, whose testimony may be so deemed incompetent, been of the Mahomedan persuasion."

By Section 74: "The sentences of the Court of Nizamut Adawlut are to be regulated by the Mahomedan Law, excepting in cases in which a deviation from it may be expressly directed by any Regulation passed by the Governor-General in Council."

Under this Regulation, the Criminal Courts were bound by the Mahomedan Law of Evidence, except in the cases provided for by Section 56 or other Special Regulation of the Governor-General in Council.

The religion of the State in Hindoostan was according to the tenets of the Soonnees. Amongst the Soonnees the testimony of the wife was not admissible concerning her husband, or of a husband concerning his wife (see Hedaya, Vol. II., p. 685). This is a rule of evidence entirely apart and distinct from that by which the testimony of women was excluded in cases inducing punishment or retaliation, as to which see Hedaya Vol. II., p. 667.

The rule is clearly and shortly stated in Harington's Sketch of the Mahomedan Criminal Law taken chiefly from the Hedaya and Futawa-i-Alumgiri (see Analysis, Vol. I., page 278): "The testimony of near connections, such as father and son, grandfather and grandson, husband and wife, master and slave, in favor of each other, is not admissible in consideration of their relative interest."

In 1809, in the case of Buncharam vs. Govindo Sahoo and Ram Sahoo, charged with the murder of Ramnarain, the wife of the

prisoner, Ram Sahoo, was considered to be not admissible as a witness for the prisoner to prove that Ramnarain was committing adultery with her. (1 Select Reports, page 183.) The probability is that in this case the prosecutor objected to the evidence adduced by the prisoner, and that the point was distinctly decided in the presence of Mr. Harington and Mr. Fombelle.

By the English Law, as a general rule, husbands and wives cannot be witnesses for or against each other in criminal proceedings.

In Staundforde's Pleas of the Crown, first published in 1557, p. 26. b., quoted in Dalton's Justice of the Peace, p. 377, it is said: "The wife is not to be bound to give evidence nor to be examined against her husband, for by the laws of God and of this land she ought not to discover his counsel, or his offence in case of theft, or other felony."

I may observe that it is well established that, under the English Law, a wife is not bound to disclose even her husband's treason.

Sir Edward Coke, in Co. Litt. 6. b., says that husband and wife are two souls in one flesh, and it might be the means of implacable discord and dissension between them, and cause great inconvenience, if such testimony were admitted.

Mr. Justice Buller says, if a wife were a witness for her husband, it would be a strong temptation to commit perjury, and if against the husband, it would be contrary to the policy of the marriage, and would create much domestic dissension and unhappiness. (Buller's Nisi Prius, 286. See also Blackstone's Commentaries, p. 443. Best on Evidence 226, 694).

Cases of injuries done to the wife by the husband, on the reverse, form an exception to the general rule.

The law prevailing in the United States on this subject is similar to that of England. (See Kent's Commentaries, Vol. II., page 184; Taylor on Evidence, 1062; Greenleaf on Evidence, S. 254.) In America it has been held that the evidence of a wife cannot be given against a husband even by his own consent, on the ground that the public have an interest in the peace of families.

The rule of law which excludes the evidence of a wife in favor of or against her husband is no exceptional or arbitrary rule of Mahomedan and English Law. I believe it will be found to exist in the jurisprudence of all the most enlightened and civilized nations of the world. It is to be found in the Roman Law, Digest, Book 22, Tit. 5, which treats husband and wife as one per-

son for this purpose. So in the French Law, Code d' Instruction Criminelle, Arts. 156 and 322. By Article 322 it is provided that such testimony may be received before the Court of Assize if no objection is taken to its admission by the opposite party. Further, Article 269 of the Code empowers the President to summon any persons whose evidence is not admissible, and question them for the purpose of obtaining information. But he cannot administer an oath to them. He does not, and cannot, make them witnesses.

By the Law of Scotland, persons are rejected as witnesses in the causes of certain near relatives. Wives and children cannot be compelled to give testimony against their husbands and parents *ab reverentiam personarum et metum perjurii*. (See Erskine's Institutes of the Law of Scotland, Book 4, Tit. 2, S. 24, Vol. 2, page 979 of the edition of 1828.) It appears, however, that there are some exceptions from the laws of exclusion "introduced from necessity to the effect of reducing the objection from disqualification to credibility." Such is the case of *penuria testium*. This is confined chiefly to criminal acts where secrecy is studied; 2ndly, to domestic occurrences which necessarily exclude the presence of strangers; or, 3rdly, to the case of witnesses necessary to the act in question. (See Bell's Principles of the Law of Scotland, S. 2256).

Erskine gives an instance: "Children have been admitted as witnesses in an action brought by the mother against her husband for separation and maintenance on account of his harsh treatment of her, there having been no servants at the time in the family by whom the fact might have been proved." A witness is rejected upon his propinquity of blood to him who produces him, though he stands in as near a relation to the party who makes the objection, in so much that his testimony is not received even *cum nolo*.

If the rule of exclusion be established, and partial exceptions either created by express legislation as in this country and in England, or established by careful judicial decision as in England and Scotland, or compensations provided by legislation as in France, the benefits of the rule may be preserved, and all inconvenience arising from any deviations from the rule may be either entirely avoided, or incurred only in cases of absolute necessity, or reduced to a minimum.

It has been well said that marriage is an institution of natural law antecedent to all forms of Government, and even to the organization of civil society. The rule excluding the testimony of married persons against each other is one which maintains the inviolable sanctity of the confidence of married life. The rule has its foundation in the deepest and purest instincts of human nature. We can trace it in the laws of almost all civilized nations, differently expressed in the laws of different countries sometimes laid down in distinct and formal propositions, with reasons given for them, as in the Law of England sometimes as part of a larger and wider rule of exclusion. It seems no unnatural inference that it has existed from a period prior to all legislation as one of those

"Unwritten laws by all men recognized;
They are not of to-day or yesterday
But live for ever, nor can man declare
From whom or whence they sprang."

See Sophocles Antigone, line 450.

Such was the character of the rule which was law in this country in 1809, and it appears to me to be one which could only be abrogated by an act of the Legislature, and ought not to be lightly set aside by judicial decision.

I proceed to examine the cases which have, or are supposed to have, infringed on the rule. In Hurrah's case in 1805, Select Reports, 7, the prisoner was charged with murder, and the question was whether the widow of the deceased was a competent witness to sustain a claim for *kisas or retaliation* in which she as an heir was supposed to be interested. The Mahomedan law officer declared her to be incompetent for that purpose, and his opinion is confirmed by that of the Editor, apparently Mr. J. H. Harington (see Preface), in a note.

The case, therefore, does not touch the present question, but supports the proposition that, by the Mahomedan Law, an interested witness is inadmissible.

In Mussamat Mughneeze, Ohariya, 1 Select Reports, 144, two wives of the prisoner gave evidence against him. It does not appear that the question of the admissibility of the evidence was raised. The case is reported by Mr. Dorin, who, in a note, appears to have misunderstood Hurrah's case, and it is contrary to that reported at page 182 of the same book.

Regulation I. of 1810 provided for dispensing with the attendance and futwa of the law officers in the Courts of Circuit, and by Section 4 enacted "that, in the event of any question of Mahomedan Law arising upon

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The result of this enactment would naturally be that, in all doubtful cases, the evidence, whether admissible or inadmissible, would be recorded, and would have to be dealt with by the Nizamut Adawlut.

Regulation XVII. of 1817 recites that the Mahomedan Law of Evidence in some cases, especially those of Zina, including adultery, rape, and incest, is such as to render a legal conviction almost impossible, &c., and its exceptions to the competency or credit of witnesses are in some instances inconsistent with the ends of public justice, and enacts (Section 5):—"If the evidence of a witness on a criminal trial before a Court of Circuit be declared by the Mahomedan law officer inadmissible on the ground of the witness being a public officer, &c., or any other ground of exception in the Mahomedan rules of evidence which may appear to the Judge unreasonable, the Judge shall cause the examination of the witness to be taken notwithstanding the exception stated by the law officer, and shall require the latter, on the completion of the trial, to declare in his futwa the sentence to which the prisoner would have been liable if the evidence of the witness objected to had been admissible under Mahomedan Law."

If the conviction of the prisoner depended wholly or exclusively on the evidence objected to by the law officer, the Judge was not to pass any sentence, but to refer the trial to the Nizamut Adawlut.

By Section 4, if two or more Judges of that Court, on a deliberate consideration of the evidence and circumstances of the case, concurred in opinion that the proof against the prisoner was sufficient to convict, and that he was in every respect a proper object of punishment, the Judges were declared competent to convict and pass sentence upon him as if he had been convicted by the futwa of the law officer.

This Regulation, as long as it remained in force, gave to the Courts a discretionary power to act on the evidence of interested and other witnesses whose testimony was excluded by Mahomedan Law, and, amongst

others, of the husband or wife of an accused party.

In 1820, in Lurrye Chung's case, 2 Nizamut Adawlut Rep., p. 149, the Court found that the wife of the prisoner had been called to give evidence against him, though her testimony was wholly unnecessary. The Court say that the practice of summoning such a near relation of the prisoner as a witness for the prosecution, excepting in the case of urgent necessity, was highly objectionable.

In 3 Nizamut Adawlut Rep., p. 309, the Court acted on the evidence of the son of the prosecutor, against the opinion of the Mahomedan law officer. In the Nizamut Adawlut Reports for 1852, Part 1, page 156, Mr. Mills says: "Though the testimony of a wife against her husband may be received in our Courts, yet the practice of summoning a wife to give evidence against her husband has always been held to be objectionable, and is one which should on no account be encouraged." In the Nizamut Adawlut Reports of 1857, page 474, Messrs. Loch and Bayley expressed themselves in similar terms, and on that ground considered it unnecessary to refer to the evidence of the prisoner's wife. In the Nizamut Adawlut Reports, 1855, page 213, the wife of the prisoner was admitted as evidence against him.

The Nizamut Adawlut of the North-Western Provinces, acting on the authority of the cases in the Select Reports, Vol. I., page 144, Vol. II., page 149, while allowing that the evidence of a wife was admissible, stated that the summoning of the wife as a witness for the prosecution was highly objectionable.

I lay wholly out of consideration the authority of Mr. Bentham and Mr. Livingstone, and attribute no special value to their opinions as to what should or should not be enacted as the law on this subject. Their views and opinions have been long and familiarly known to those employed in the business of legislation in this country. With full knowledge of those opinions and of what had been done under Regulation XVII. of 1817, the Government, by Act XV. of 1852, in legislating for Her Majesty's Courts, declared that nothing in that Act contained should in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.

Again, Act II. of 1855 (an Act to improve the Law of Evidence in all Courts of Jus-

tice), by Sections 14, 18, and 19, provided a remedy for the evils alluded to in Regulation XVII. of 1817. By Section 20, it rendered husbands and wives competent to give evidence for or against each other in *Civil proceedings*, subject to a proviso that any communication made by the one to the other during the marriage should be deemed a privileged communication, and should not be disclosed without the consent of the person making the same.

It is clear that the Legislature deliberately refused to sanction the admission of wives and husbands as witnesses for or against each other in criminal cases. Regulations I. of 1810 and XVII. of 1817 were repealed by Act XVII. of 1862, and by that repeal an end was put to any special and exceptional powers of the Zillah Courts to admit, at their own discretion, evidence whether admissible or not under Mahomedan Law. But Regulation IX. of 1793, which made the Mahomedan Law the Law of the Criminal Courts, was repealed at the same time.

What then remained? If the ancient law, as it prevailed in the conquered and ceded territories, except so far as it is altered by the subsequent legislation of the conquerors, is to remain, the evidence is excluded because it would be excluded by Mahomedan Law. If the repeal of Regulation IX. of 1793 is to be taken as a declaration that the Courts are no longer to be guided by Mahomedan Law in any respect (and there is no doubt much to be said in favor of that view of the case), then, I think, where we have no positive law to guide us, we must act upon those universal principles of right which are recognized by *our own law*. If the conditions of the married life of the people of the country had been in all respects similar to those which exist in our own country, there would not, in my opinion, be a doubt on the present question. I cannot accept the loose practice of Zillah Judges, under the exceptional powers of Regulation XVII. of 1817, though sanctioned by the Sudder Court, as having established by judicial decision a rule on this subject. There is no instance in which the question has been raised and formally decided by the Court after argument, on a full consideration of all that could be said on either side of the question. It seems to me that the Sudder Court always felt that, in admitting the evidence, it was on dangerous ground, and evidently saw the mischief likely to result from doing so. The Legislature, in passing Act

II. of 1855, distinctly declined to sanction their practice.

I must admit, however, *first*, that Polygamy amongst the Mahomedans and Koolin Brahmins places wives in a relation to their husbands different from that occupied by a European wife towards her husband. *Secondly*, as I understand it, the ancient Criminal Law of the Hindoos allowed the wife or husband to be called on to testify the one against the other, though such evidence was not admissible in civil cases. See the Dharma Sastra of Yajnyawalkya by Roer and Montriou, Sloke 72, page 28; Mitacshara translated by Macnaghten (1 Macnaghten's Hindoo Law, page 246).

From these circumstances, it has no doubt been the case that in this country the admission of such testimony has not been felt to be, and is not in fact, a violation of the law of the family in the same sense that it would be in a European community.

Still the Mahomedans appreciated the wisdom of the rule as applicable to the state of their own society; and for the Hindoos, they are now living under a rule wiser, milder, and more merciful than of their own Criminal Law, and the Polygamy of Koolin Brahmins is an exceptional institution.

I believe that, in practice, the cases where a crime is committed under circumstances that it cannot be proved except by the testimony of husband or wife, are rare indeed. I do not recollect one such in the whole course of my reading. It was said, indeed, that Rush would not have been convicted had he been married to the wretched woman who lived with him. It is easy to suppose exceptional and extraordinary cases, as Mr. Livingstone and Mr. Bentham have done. The arguments of my learned brothers might have greater weight if the great object of social life was to convict criminals---if we were bound to presume that every husband, against whom a wife should be called, was guilty. I believe that, if these suggestions were adopted in European communities, the peace and confidence of hundreds of homes would be interfered with for an advantage of most doubtful character. If I were at liberty to speculate on the subject, I might say that some rule for admitting the testimony of a husband or wife in exceptional cases might be enacted by the Legislature.

There is another point on which I have not yet touched, *viz.*, the danger of perjury. Mr. Fitz-James Stephen's observations on this subject appear to me full of good sense.

Vol. VI. He admits, as every one must, that, if considered merely with reference to the discovery of the truth, the exclusion of the testimony of husband and wife cannot be defended. At page 201 he says: "The proposal to make a prisoner a competent witness on his own behalf has an appearance of system about it which at first sight is extremely plausible. It would, no doubt, harmonize with what I have called the litigious theory of criminal trials, but there are strong objections to it. In the first place, the prisoner could never be a real witness; it is not in human nature to speak the truth under such a pressure as would be brought to bear on the prisoner, and it is not a light thing to institute a system which would almost enforce perjury on every occasion. It is a mockery to swear a man to speak the truth who is certain to disregard it."

At page 286 he says: "The objections, already stated, to making the accused competent witnesses, apply with greater force to the case of their husbands and wives, inasmuch as to the conjugal love which would lead a person to screen a wife or husband, is a better motive than the self-love which would lead a man to lie in his own case, and not less powerful. It is so important that perjury should not be committed, and especially that it should not be committed under circumstances which would lead the public to sympathize with the criminal and it is so much more important that the administration of criminal justice should harmonize with the public feeling than that it should exhaust all possible means of convicting criminals—that I think the utmost modification of the present law which would be advisable would be to permit an accused person to call husband or wife if he thought fit."

I may observe that, in the case before us, and in regard to which the reference was made, the wives of four prisoners were called for the prosecution, three of whom gave false evidence to save their husbands. The same result followed for calling the wife in the case from the North-Western Provinces, and in the case cited from the Nizamut Reports of 1855.

I am of opinion that there is no law in this country which makes the evidence of a wife admissible for or against her husband in criminal cases other than charges of injuries or wrongs done by the husband to the wife, and, as a consequence, that such evidence is not admissible against the hus-

band, or for or against parties included in the same charge, and standing on their trial at the same time with her husband. As to the latter point, see *The King vs. Smith* before the 12 Judges, 1 *Moody's Crown Cases*, p. 289; *Roscoe's Evidence in Criminal Cases*, p. 117.

There are two decisions of the High Court in accordance with my opinion, viz., that of Mr. Justice Steer and Mr. Justice L. S. Jackson, in *The Queen vs. Noyandee and Shodai*, decided in 1863; and that of Mr. Justice Kemp and Mr. Justice Glover in *The Queen vs. Gourchand Polie*, 1 *Weekly Reporter*, page 17.

Campbell, J.—I entirely concur in the judgment of the Chief Justice. Any further question on the subject has been, to my mind, cleared up by the judgment of Mr. Justice Norman.

The question before us is not whether it is under certain circumstances expedient to examine the wife, or what questions she may be properly pressed to answer, but whether she is or is not absolutely inadmissible as a witness for or against her husband, and for or against any person tried jointly with her husband, according to the strict rule of English Law.

I do not understand my brother Norman to found his objection to the admission of the wife on a broad rule which would equally exclude the son, the father, and other near relations, as interested parties. He would not, I believe, exclude these other relations: the daily practice of the Courts and the necessities of justice render that impossible. The rule which he maintains is the English rule.

That rule he looks at from two points of view—(1) that of natural justice, and (2) with reference to the law and practice of the Indian Courts.

As respects natural justice, he considers the English rule to be one of those "unwritten laws" which prevail, or ought to prevail, all over the world; and although I have no doubt that our function is in fact "*jus dicere*," not "*jus dare*," and apprehend that we can hardly at this time deliver unwritten laws of our own concoction, I notice this part of the subject merely to say that the authorities quoted by my learned brother in regard to the provisions of various laws seem to me to show that the rule maintained by him, or anything like it, has never been adopted in any country whatever except England. By none of the authorities quoted is the evidence of the wife specially

and absolutely excluded. They all, without exception, merely refer to certain cautions and restrictions in regard to the evidence of a large class of interested parties, including all near relations; and none of them absolutely exclude such evidence. Some old Mahomedan law-books seem to lay it down as a maxim that the evidence of parties standing in certain positions of relationship "is not to be believed" because they are interested: for instance, parties related as father and son, grandfather and grandson, husband and wife, master and slave. I doubt whether, under this rule, these parties were ever absolutely excluded. At any rate, the Mahomedan Law of Evidence has been relaxed in India. In France, again, the rule applies to a similar large class of relations, and seems to amount simply to this: They are all *prima facie* admissible, but if either party objects, then the President is to decide at his discretion whether the witness shall or shall not be examined with reference to the circumstances of the particular case. There is no inadmissibility there. So again in Scotland, the practice, as set forth by my learned brother, is in brief this, that certain near relatives are not to be examined *except in case of necessity*, when the case cannot be proved or disproved in any other way. That it, in fact, the rule laid down by the Sudder Court in this country. I conclude, then, that no consent of nations imposes on us the English rule absolutely excluding the wife, and the wife only.

I next look to Indian Law and practice. I believe that thousands of cases might be found, in which both wives and other relations have been admitted as witnesses, but in which the point is not reported, because no one thought of objecting. That is the reason why the number of rulings on the point is comparatively small. I doubt whether the evidence of a wife was ever really excluded on the ground of Mahomedan Law. There is only one case in the early Reports—that of 1809. There the witness was in fact examined, and it seems to me that the Judges afterwards used the term "inadmissible" only in the sense that the evidence could not be admitted to full credit. But, be that as it may, my brother Norman has pointed out the important fact that, by a subsequent Regulation (XVII. of 1817), the restrictions of the Mahomedan Law of Evidence were by express enactment swept away. To use the words of my learned brother, "This Regulation gave to the Courts a discretionary power to act on the

"evidence of interested and other witnesses, and, amongst others, of the husband or wife of an accused party." We are, therefore, I think, all agreed that, from 1817 onwards, the evidence of the wife was admissible; and a series of cases shews that the Courts acted accordingly. What, then, has occurred to introduce a restriction? Clearly nothing, as it seems to me. I cannot imagine that any argument can be founded on Act II. of 1855 for excluding evidence which up to that time was admissible in the Company's Courts, since that Act, in the most express terms, provided that nothing contained in the Act should be construed to render inadmissible in any Court any evidence which but for the Act would have been admissible in such Court. The Act merely provided, as it were, a *minimum* of admissibility in all Courts, leaving to those Courts having more liberal rules the freedom which they before enjoyed. It was principally designed to relax the stringency of the English Law of Evidence in consequence of recent reforms in England. It did not exclude the wife in criminal cases, although it did not go beyond the reforms of English Law in respect of Courts governed by that Law so as to admit the wife in those particular Courts.

The real question seems in fact to be whether the most technical parts of the English Law of Evidence are to be introduced into our Courts. For that I think that there is not the least warrant of law. As respects the practice, I always feel that in these matters there is this difficulty, that the Law of the Mofussil Courts has been so indefinite and uncertain that there is scarcely any doctrine popularly known as English Law which, somewhere or other, in the course of a vast number of judgments extending over very many years, may not be found to have been somewhere quoted by one or two Judges for some purpose of argument, illustration, or decision. But, in my opinion, such rare misquotations do not establish a law. The English Law of Evidence was notoriously, till within a recent period, one of the most barbarous and artificial in the world; and though a great deal of the worst part of it has now been swept away, a good many things still remain which many people think bad in England. At best, they are only supported there by the peculiar circumstances of English laws, habits, and procedure, and are, I think, altogether inappropriate to a widely different country. I should think it a very great misfortune if, just when the English Law is, bit by bit,

Vol VI. approaching to complete reform, its most barbarous and technical portions could be imported into this country by the mere *dicta* of one or two Judges speaking loosely in the absence of definite law. In the present instance, however, it seems to me that Regulation XVII. of 1817 and Act II. of 1855 have settled the matter by Statute, and that there is really no decision from 1810 to 1862 which lays down the doctrine of the exclusion of the wife. Both the High Court of Madras and the Sudder Court of the North-Western Provinces have recently ruled that her evidence is admissible. The only precautionary direction in which both the consent of nations and the practice of our Courts seem to agree, is that the Court should exercise its discretion, and not *unnecessarily* force a near relative to give evidence or to answer unfair questions. That is, I think, a very proper rule, and it will probably meet the difficulties which seem to have suggested themselves to the minds of some Judges; but it is not exclusion by law. I would admit the evidence of the wife as not contrary to law, because it seems to me that there is no law to exclude it, and that, in the absence of such a law, all witnesses are admissible subject to objection to their credibility.

Seton-Karr, J. - We have not had the advantage of hearing Counsel on the important point submitted to us by the Divisional Bench, as none appeared on either side; but we have discussed the reference together, and I, personally, have had the advantage of perusing the elaborate judgments recorded by my learned colleagues the Chief Justice, Mr. Justice Norman, and Mr. Justice Campbell.

I lose no time in recording my own opinion, which is in unison with that of the learned Chief Justice and Mr. Justice Campbell.

First. - It seems to me that the Mahomedan Law can be no possible warrant for our sanctioning the exclusion of a wife from giving evidence in criminal cases as a witness for or against her husband, or for or against other persons than her husband charged jointly with him on a criminal trial. The Mahomedan Law relative to the admissibility of evidence was eminently fantastic, barbarous, unjust, and capricious. Regulations were made from our earliest days in order to remedy or annul sundry of its most patent absurdities, and of late years it has been, as a Code, entirely swept away.

It next seems to me that we can derive no warrant for the exclusion of the wife's testimony from any of the provisions contained in the well-known laws passed for the improvement of evidence, Act XV. of 1852 and Act II. of 1855.

The first of these laws, Section 3, merely enacts that nothing contained in the law shall render competent, or shall compel the wife to give evidence against the husband, and *vice versa*, husband against the wife. As remarked by the learned Chief Justice, this Act does not render either of these parties absolutely incompetent; it merely leaves matters in this respect just as they were.

The same remark applies to the later and the more comprehensive enactment, Act II. of 1855. Section 14 of this law, in declaring what persons are incompetent to testify, expressly mentions children under 7 years of age and persons of unsound mind as incompetent, but says nothing about wives. Section 20 indeed does expressly recognize the competence of husband and wife in all Civil proceedings to give evidence for or against each other. But Section 58, the last Section of the Act, specifies that nothing in the law shall render inadmissible evidence now admitted in the Company's Courts, that is, in the Courts of the Mofussil. By this proviso, then, it seems clear to me that the Law of Evidence in criminal trials was left just where it was.

The next question, then, is whether, interpreting the law, and referring to the decisions of the late Sudder, and of our own Court, we can say that there has been such an uniform and consistent course of decisions from the commencement of this century as to warrant us in ruling that the wife has been held, and ought to be held, incompetent to give evidence against or for her husband. The decisions referred to and analysed by my learned colleagues sufficiently show that there has not been any such uniformity. It was clearly the practice of the Court to admit such evidence in cases of necessity, or when other evidence could not be procured. Opinions can, no doubt, be quoted in favor of the exclusion of the wife, but it is on account of this diversity of opinion, and possibly of practice, that we are now called on to say what is the correct rule and practice, or to lay down some rule for the future. The earlier authorities are in favor of the admission of the wife. Mr. Mills, an eminent public servant of very large experience, expressly recognizes the

practice, and, certainly, my own experience is that, in practice, the testimony of the wife is constantly admitted.

But it may be said, if there has been this uncertainty of law, and this diversity of opinion, why not take the opportunity of ruling that the English Law, the offspring of great intellects, of liberal institutions, and of humanity and civilization, shall be our guide on this subject? We seem all agreed that the English Law of Evidence is not the law applicable to the Courts of the Mofussil; but still it may be contended that, in cases of doubt or difficulty, we may endeavour to arrive at a sound decision by reference to the analogies of a science based on reason and ameliorated by the labors of jurists and philanthropists of acute analytical powers, wide sympathies, and liberal views. It may be said, too, in furtherance of this view, that the experience of other countries confirms and strengthens the position of those who feel inclined to resort to, or to rest their decisions on, the English Law.

In answer to this, I would observe that, as pointed out by the Chief Justice and Mr. Justice Campbell, the laws of other countries are not absolute and uniform on this point. The English Law itself admits of deviations from the rule of exclusion. At Common Law, and even before certain enactments were passed, the rule did not apply where a personal injury had been committed by the husband against the wife, and *vice versa* (Broom's Legal Maxims, p. 477). A difference of opinion clearly exists amongst the highest English authorities as to whether the wife can give evidence against her husband in cases of high treason (Taylor on Evidence, p. 1066); and other "necessary exceptions," says the same authority, have been engrafted on the Law of England, so as to admit of the wife having a remedy against personal injury. In short, it seems quite clear that the Law of England, positive as it is in many respects on this important doctrine, does admit of exceptions and qualifications, while the opinion of several eminent jurists tends directly to controvert the soundness of the principles on which the exception is based, and to enforce, as desirable in the interests of justice, the admissibility of the wife's evidence.

The long extract from Mr. Livingstone's writings quoted by the learned Chief Justice sets forth the arguments for the admission of such evidence with a logical force, with a breadth of view, and with a power of

language, which I should think it would be difficult to refute or weaken. This is a task which I certainly shall not think of attempting.

On this particular point, then, I may be warranted in at least concluding that the soundness of the English doctrine is fairly open to some question.

I have always understood that the basis of the English Law in this respect is the maxim that husband and wife are "*duæ animæ in carne una*," and that the admission of the evidence of either would be against public policy, as leading to interminable discord, and to the disunion of families.

Then admitting, for the sake of argument, that much may be said in support of the exclusion of the wife from a purely European point of view, we may fairly ask whether the circumstances which distinguish the marriage tie, and which regulate social life in this country, are on a strict parallel with those of civilised Europe. Our learned colleague, Mr. Justice Norman, has quoted some excellent lines from an ancient poet and moralist relative to those "unwritten laws" which are an emanation from the Deity himself, and to which no human intellect ever gave birth. I admit their force in some instances, and as the foundation of all law, but, for the matter before us, I would venture to quote the language of another ancient author, the most eminent jurist of his time, who tells us: "*Accommodabimus, hoc tempore, leges ad illum quem probamus civilis statum* (Cic. de Leg. Lib. III., Cap. 2). And again—" *Constat profecto ad salutem civium civitatumque incolumitatem vitamque hominum quietam et beatam, in eas esse leges*" (Lib. II., Cap. 5). We must interpret laws in conformity to the temper and constitution of the people with whom we are dealing, and we must not lose sight of the great object of all criminal legislation.

Now, polygamy, we all know, is admitted and sanctioned by both the Hindoo and the Mahomedan creeds, and is daily practised in India. Let us take a few of the dilemmas which may any day arise if we give sanction to the prevalence of the English rule on this subject. A Koolin Brahmin may have 70, 80, or 100 wives. Are we prepared to say that not one of these women is, under any circumstances, to give evidence for or against her husband in a criminal trial involving the most serious consequences? It is true that it is not usual for such a husband to live with all the 70, 80,

Vol. VI. or 100 wives at one and the same time and place, and that, therefore, it is not competent for us to base an argument on the supposition that all, or a majority, or half-a dozen of the wives may be witnesses of the same crime, or of a series of crimes, on the part of the husband, and that all the mouths of all these wives, of necessity, will be shut if the rule of exclusion is to guide the Courts. But it is common for a Hindoo husband to live with more than one wife at one and the same time, and in the same household or place. We hear of the wife and of the co-wife, and of the elder Ranec and the younger Ranees, living together with the husband in numerous cases. Suppose a Hindoo or Mahomedan, in the secret privacy of his household, actuated by a fit of passion, or jealousy, or pique, to kill one wife or slay a daughter, after barring the doors and carefully excluding every other competent witness; are the mouths of the remaining wives to be closed, and is justice to be evaded? Or, suppose the converse. In a family, where there are 3 wives, one is assassinated or poisoned by one of the others. Suspicion, owing to circumstances which will suggest themselves to any mind, falls on the husband. Of the two remaining wives, one knows that the other committed the crime, and her testimony may have the corroboration of the most important circumstantial evidence. But she is not allowed to tender the deposition which would clear her husband, and would convict the murderer, because she is the only witness, and her evidence is not admissible by law. It would be very easy to go on and imagine scores of such probable and possible cases marked by every variety and shade of difficulty. Again, we have the custom of Polyandry in the hills and some parts of the plains. Are we prepared to lay down this rule of exception, and to push it to its farthest and remotest conclusion, by saying that when seven husbands commit a crime in succession, or labor unjustly under the suspicion of having committed various sorts of crimes, the ends of justice are to be defeated, or the innocent are to suffer, because the wife of the seven may not be put into the witness-box to inculpate or exculpate any one of those seven, to whom she stands in the position, not of the half which is more than the whole, but of a seventh portion of a domestic partner?

But it will be said, we increase the temptation to commit perjury, under which temptation would lie the wife who gave

evidence against the husband whom she either loved or hated, and whom she might wish to save or to ruin. I confess that this is a danger which I am prepared to meet at all times, in order to do justice, and cannot admit that the consideration is paramount to all others, or that the temptation would be of greater force in the case of wife *versus* or for the husband, than it would be or is daily, in any case where passions are excited or sympathies are strongly enlisted on one side or the other. Is it not fair to conceive that the tie which binds a son to a father, a disciple to a Brahmin, a *Shagird* to his *Pir* and *Murshid*, a retainer to a chief, might, in this country and climate prove at least as strong against the truth as the tie which binds a wife to a husband who has one, two, or a dozen other wives, and who according to his Eastern notions, does not assign to any of them that high place in the affections or in the social circle which is conceded to women in all Western countries?

At any rate, looking to the admitted prevalence of perjury in the Courts of this country, this appears to me a danger which we cannot get rid of, but which we must face boldly, and endeavour to expose by strict judicial enquiry in the case of a wife, just as we do in the case of any other person interested, connected, or influenced by peculiar motives and ties, personal and feudal, secular, social, or religious.

On the whole, then, admitting the seriousness and importance of this subject, as well as the possibility of a fair and reasonable opposition of judicial opinions, I have come to the conclusion that, looking to the law and practice, as well as to the ends of justice and to grounds of public policy, the questions referred to us by the Divisional Bench should be answered by us in the affirmative. My reasons I would sum up as follows:--

1. The Mahomedan Law, besides being barbarous and uncivilized, no longer rules or influences the decisions of our Courts or points of evidence.
2. The evidence of a wife is not rendered inadmissible by any enactment of the Anglo-Indian Legislature.
3. There exists no such consistent and uniform current of decisions of the highest Courts in the country, as would exclude the wife; but, on the contrary, in spite of some diversity of opinion, the practice has been to take such evidence.
4. Granting that we may have recourse to the principles and analogies of English

Law in cases of difficulty and doubt, there is some reason to think the state of the English Law on this head not wholly unassailable, and there is every reason to conclude that it would be highly inapplicable to the peculiar circumstances of this country, as well as that it might tend to defeat the ends of justice and to encourage secret and violent crime.

Kemp, J.—These papers have come to me after my learned colleagues have recorded their elaborate judgments. The last word generally is an advantage. But in this instance so much has been said, and so well said, on both sides of the question, that I feel that, whether I agreed or differed with the majority, I could only give my simple concurrence with one or the other. Whether the evidence of a wife for or against her husband, and, *vice versa*, that of a husband, is properly excluded in Courts which have to administer the Law of England, is a question upon which I feel that I am not competent to give any opinion worth having. My own feelings and impressions are that it is properly excluded; and when I find such eminent Judges as Lord Hardwicke, Lord Kenyon, Justice Buller, and others of the like stamp, holding the same opinion, I am content to err in such company. But that is not the question before us. Our Courts are not bound to administer the Law of England. Is there, then, any Regulation or Act of Government which enacts that such evidence is not admissible in our Courts, and has such evidence been admitted, or not, in our Courts?

The judgments of the learned Chief Justice, Mr. Justice Seton-Karr, and Mr. Justice Campbell, have fully convinced me that such evidence is not excluded by any Regulation or Act, and that the current of decisions in our Courts is, on the whole, in favor of its admission. It would be presumptuous in me to attempt to add anything to the able and elaborate arguments of those learned Judges, and I content myself with expressing my concurrence in the opinions expressed by them. I have held a different opinion hitherto, but I yield to the new light which has been thrown on the subject, and frankly admit that I have hitherto taken a more impulsive than sound view of this question.

The 9th July 1866.

Present :

The Hon'ble Sir Barnes Peacock, *At., Chief Justice*, and the Hon'ble J. P. Norman, F. B. Kemp, W. S. Seton-Karr, and G. Campbell, *Judges*.

Splitting (of an aggravated offence into separate minor offences)—Lurking House-Trespass in order to commit Theft.

Criminal Reference.

Queen versus Ram Churn Kairee.

The splitting up of one aggravated offence into separate minor offences (*e. g.*, a conviction for lurking house-trespass and theft under Sections 456 and 380 of the Penal Code, instead of for lurking house-trespass in order to commit theft under Section 457) prohibited.

Where a Magistrate convicted under Sections 456 and 380, it was held that the Judge on appeal, instead of setting aside the conviction and sending the case back to the Magistrate for re-trial under Sections 457 and 380, ought only to have set aside the conviction under Section 380, and allowed the conviction under Section 456 to stand (Norman, J., *dubitante*).

Peacock, C. J., and Kemp, Seton-Karr, and Campbell, J. J.—In this case, the prisoner was convicted by the Magistrate of lurking house-trespass by night and also of theft as two separate offences, and sentenced for both.

On appeal to the Sessions Judge, he found that the prisoner was not guilty of two offences, but of the offence of lurking house-trespass by night with intent to commit theft. The Judge set aside the conviction, and returned the case to the Magistrate to frame charges under Sections 457 and 380, with a direction that the prisoner ought to be re-tried. The Sessions Judge has since sent up his own order in order that it may be quashed by this Court as a Court of Revision, having since found that it was erroneous.

We think that the Sessions Judge was wrong in sending the case back to be re-tried on the two charges mentioned in his order. The prisoner clearly could not be re-tried under Section 380, as he had already been tried, convicted, and sentenced under that Section, as the Sessions Judge says, and properly says, under the facts found by him, erroneously.

Vol. VI. We think that the Sessions Judge was wrong in ordering the prisoner to be re-tried under Section 457, the prisoner having been already convicted and sentenced under Section 456.

We think that the Sessions Judge ought to have set aside the conviction and sentence under Section 380; the conviction and sentence under Section 456 would then have remained.

The prisoner appealed upon the ground that he was not guilty of an offence under Section 456. Upon that appeal, the Judge could not set aside the conviction under Section 456 upon the ground that he was guilty under Section 457.

If he was guilty of lurking house-trespass by night with intent to commit theft under Section 457, he was guilty of lurking house-trespass by night. Having been tried and convicted of the minor offence, the Judge could not, upon the appeal of the prisoner, set aside the conviction in order that he might be tried and punished for the aggravated offence under Section 457. The Judge's order should be altered accordingly, the effect of which will be that the sentence under Section 456 will stand, and the conviction and sentence under Section 380 will be reversed.

The Magistrate should be cautioned to be more careful in future, and not to split up one single aggravated offence into separate minor offences.

As regards the prisoner who has not appealed, he may have the benefit of a similar order by this Court as a Court of Revision.

The case will go back to the Division Bench.

Norman, J.—I concur, though not without some doubts whether the Judge's order directing that the prisoner should be tried under Section 457 is not correct, and whether we might have treated the splitting the charge as an error in law justifying the Judge in reversing the whole sentence of the Magistrate.

The 9th July 1866.

Present :

The Hon'ble L. S. Jackson and W. Markby,
Judges.

Use of Musical Instruments for the purpose of annoyance (Order of Magistrate prohibiting).

Criminal Jurisdiction.

Miscellaneous Case.

Ram Chunder Geer Gossain and another,
Petitioners.

A Magistrate cannot, under Section 62, Code of Criminal Procedure, in general terms forbid two parties to use any musical instrument in the neighbourhood of each other's house, though he may forbid their doing so for the purpose of mutual annoyance.

We think that the order of the Officiating Magistrate passed in this case is greatly too general and sweeping in its terms. It appears that a complaint had been made that the petitioner (who is a Gossain) had gone abroad to pay a visit, accompanied by a body of retainers and Chobdars, and also by persons carrying horns, which horns were blown for the glorification of the petitioner and to the annoyance of the other party to these proceedings. The Deputy Magistrate, it seems, had separately convicted the prisoner and several of his attendants for an unlawful assembly. The proceedings were then referred to the Officiating Magistrate for further orders, and the Officiating Magistrate directed each party to enter into recognizance for 5,000 rupees to keep the peace for one year; also that neither party should use any musical instrument in the neighbourhood of one another's houses, and that their license to carry arms should be withdrawn. This order is said, in the Magistrate's letter of explanation, to be lawful under the terms of Section 62 of the Code of Criminal Procedure. If the order were lawful, the petitioner, upon what might appear to be a breach of it, if such disobedience tended to cause annoyance to any person, might be punished, under the 188th Section of the Indian Penal Code, with simple imprisonment or with fine, or both.

If the Magistrate had contented himself with saying that the parties were respectively forbidden to use musical instruments, such as horns, for the purpose of mutual annoyance, the order might have been reasonable enough. As it is, the order he has passed is one, disobedience to which might be possibly inferred from the most harmless and innocent acts of the petitioner.

We think, therefore, that the order should be modified, and that the parties should be directed to abstain from the use of horns or other musical instruments "*for the purpose of mutual offence*" in the neighbourhood of each other's house.

The 9th July 1866.

Present :

The Hon'ble L. S. Jackson and W. Markby,
Judges.

Using forged document—Copies—Evidence.

Queen versus Nujum Ali, Appellant.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of using as genuine a forged document with guilty knowledge.

A person may be convicted of using as genuine a document which he knew to be forged, though he in the first instance produced only a copy of it.

When a Civil Court authorising a criminal prosecution in case of offences against public justice, instead of completing the investigation itself, and committing the parties for trial before the Court of Session, simply refers the proceedings, and leaves it to the Magistrate to commit or not as he thinks proper, the depositions taken before the Civil Court are not admissible in evidence, as depositions taken before the Magistrate are in certain cases under Section 369, Code of Criminal Procedure. But by Section 57, Act II. of 1855, the improper admission of such evidence is not of itself ground for the reversal of the Sessions Judge's sentence, when, independently of that evidence, there is sufficient evidence to justify the decision.

We think that no valid ground whatever has been adduced for disturbing the judgment and sentence of the Court below. Mr. Twidale, who appears for the prisoner, has raised the question of whether or not the prisoner can rightly be convicted, under the circumstances, of using a document which he knew to be forged. It appears that the document was, for the first time, produced in a Civil suit before the Moonsiff in 1861. Subsequently, upon this circumstance being brought to the notice of the party by whom it was said to be executed, she instituted proceedings in the Court of the Principal Sudder Ameen in 1863, with the view of having that document brought into Court and declared spurious. In the first instance, it seems that only a copy of it, taken from another copy, was produced; but subsequently, by direction of the Principal Sudder Ameen, the original instrument was brought into Court. That happened some time, apparently, in December 1863, and he gave judgment, finally deciding against the authenticity of the document, on the 29th of December 1863. Now, it appears that the prisoner set up that document: whether he produced a copy or the original, seems of little consequence. What he was charged with in these proceedings was, that he made

use of such a document knowing it to have been forged. It may be that, in the description of this offence in the charge, there was some little inaccuracy or ambiguity, but it cannot be supposed that by this the prisoner was prejudiced. He quite knew the issue he had to defend, namely, that he used, upon the proceedings before the Principal Sudder Ameen, a document which he knew to be forged, and we have no doubt that the facts proved amount to such using.

Then an objection is made to the credibility of the witnesses in the case. It appears to us that the testimony of these witnesses is wholly unimpeached. They had, it is true, a certain interest in the result of the trial—that is to say, that if the deed of gift was not made out, they would be entitled, in greater proportions, to inherit the property. But we see no sufficient reason in this inducement for attributing to them the gross perjury which they would be guilty of, if their statements are false.

There is a circumstance which has not been alluded to by the vakeel for the prisoner, which it is perhaps right to notice here, that is to say, that the Sessions Judge has made use, upon the trial, of the depositions of the deceased lady, Mussamut Tahoorun, given by her before the Principal Sudder Ameen, previous to the case coming into the hands of the Magistrate. Now, Section 369 of the Act of Criminal Procedure authorizes the Sessions Judge to allow the use, at the trial, of the examination of a witness taken and attested by the Magistrate in the presence of the accused person under certain circumstances. In this case, it does not appear that the Principal Sudder Ameen availed himself of the power given him in Section 173 of the said Act, to complete the investigation himself, and to commit the parties for trial before the Court of Session. He simply referred the proceedings, and left it to the Magistrate to commit or not, as he thought proper. Under these circumstances, the depositions taken before the Principal Sudder Ameen do not appear to be properly admissible under Section 369. But by Section 57 of Act II. of 1855, the improper admission of evidence is not, of itself, ground for the reversal of any decision in any case, if it appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there is sufficient evidence to justify the decision. As in this case there was abundant, and superabundant, evidence to justify the prisoner's conviction, that defect does not, of

Vol. VI. itself, form a ground for interfering with the Sessions Judge's sentence.

Then as to the sentence which was passed, the prisoner's vakeel contends that the sentence is very severe. On the contrary, it appears to us that this is a case of aggravated criminality. The prisoner endeavoured, by forging an instrument, and by other proceedings in connection with that instrument, to deprive Mussamut Tahoorun, and also her heirs, of property which she possessed. It appears to us that the sentence is, in no way, too severe, and that, therefore, it must be affirmed.

The 9th July 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell, *Judges*.

Jurisdiction (of High Court)—Conviction (Reversal of—on extraneous evidence derived from another case).

Criminal Jurisdiction.

Referred under Section 434 of the Code of Criminal Procedure.

Nussur Ali *versus* Mr. G. Hart.

Prisoner was convicted by one Court of criminal intimidation on a charge by A, the conviction being confirmed on appeal by the Judicial Commissioner; but was acquitted by another Court of assault and robbery alleged to have been committed on the same day on a charge by B. The latter Court pointed out to the Judicial Commissioner that the facts proved in B's case raised a strong presumption that A's case was a false one, the result of a conspiracy against the prisoner; and the Judicial Commissioner proposed to set aside the conviction of the prisoner in A's case, not on the evidence in that case, but on extraneous evidence derived from B's case. HELD that the High Court had no jurisdiction in the matter; but that the Judicial Commissioner could apply to the Government for a pardon on the ground stated by him.

MR. GEORGE HART was convicted by Mr. Carnegie, the Extra Assistant Commissioner of Kamroop, Assam, of a charge made by one Nussur Ali of criminal intimidation, and sentenced to six months' imprisonment. The conviction and sentence were confirmed on appeal by the Officiating Judicial Commissioner.

Hart was also charged by Bukut Ram with assault and robbery on the same day. This case was tried before Captain Sherer, and he was of opinion that Nussur Ali had attempted to suborn the prosecutor as a witness in his own case. After a careful trial, the charge of robbery was dismissed, and Captain Sherer pointed out that the

facts proved in that case raise a strong presumption that Nussur Ali's case was a false one, the result of a conspiracy against Hart.

The Judicial Commissioner, in a letter to this Court, adopting that view, suggested that the Assistant Commissioner's decision should be reversed, and that Hart should be acquitted.

The ground on which the Judicial Commissioner proposes to set aside the conviction of Hart is not on evidence apparent or the record of the case, in which Hart was punished, nor on any other ground cognizable by this Court under Sections 404 and 405 of the Criminal Procedure Code. The Judicial Commissioner would release the prisoner on extraneous evidence derived from another suit. We do not think that we can properly take any action in the matter; but the Judicial Commissioner can apply to the Lieutenant-Governor for a pardon on the ground stated by him.

The 10th July 1866.

Present :

The Hon'ble F. B. Kemp and W. Markby, *Judges*.

Murder—Culpable homicide not amounting to murder—Dishonoring a wife.

Queen versus Maithya Gazee and Esoff.

Committed by the Magistrate, and tried by the Sessions Judge of Tipperah, on a charge of Murder.

Where a man was murdered by his brother and nephew while in the act of dishonoring the brother's wife, -- HELD that there was grave and sudden provocation, within the meaning of Exception 1, Section 302 of the Penal Code, which would have justified the murder, if only such force had been used as was necessary to protect the wife from the outrage to which she was being subjected; but that, as the deceased had been beaten in a cruel and vindictive manner, the prisoners were guilty of culpable homicide not amounting to murder.

In the appeal of the prisoners Maithya Gazee and Esoff, we have perused the proceedings in the Lower Court, and we think that the finding and the sentence of the Sessions Judge should be altered in both cases.

It appears that the deceased Nurrah Gazee was the elder brother to the prisoner Maithya Gazee, and uncle of the prisoner Esoff.

The prisoners are convicted of the murder of the deceased Nurrah Gazee, and the

circumstances out of which the conviction arose occurred at night in the house of Maithya, when the only persons present were the two prisoners, the deceased, and one Saya, the wife of the prisoner Maithya.

The woman's evidence was taken, and we think that, as she was the only available witness, we are justified in looking at her evidence for the purpose of estimating the guilt of the prisoners.

It appears that, above two hours after dark on the night in question, the two prisoners were in bed, that the woman Saya was sitting smoking at the door, and that the deceased was in the house; but whether he had been to bed or not does not appear. The woman's account of the matter then is that the deceased Nurrah came to her and took hold of her hand, upon which she said, "This is improper: my husband is inside;" but that the deceased, notwithstanding, kept dragging her away: that she then called out, when her husband and Esoff came, and that the two together beat the deceased with their feet and elbows till he ceased to breathe; and that then they carried him to his own house.

The prisoner Maithya has never denied his guilt, and his account of the transaction is substantially the same as that of his wife. The prisoner Esoff gives pretty nearly the same account, but denies that he struck the deceased.

We agree with the Sessions Judge in thinking that the outrage by the deceased upon the woman Saya had gone much farther than merely taking hold of her hand. According to the husband's statement, he charged the deceased with having dishonored him, and the deceased admitted it in an ironical manner. And both prisoners state, and the woman admits, that when the prisoner Maithya was first aroused by the cries of his wife, she was on the ground under the deceased.

The Sessions Judge seems to have had no doubt that the crime was murder, and that the only question was whether the sentence of death ought to be inflicted; but we think that the first question to be considered is whether there was not such grave and sudden provocation as may well have deprived the prisoner Maithya of the power of self-control within the meaning of Exception 1 to Section 300 of the Penal Code. It is difficult to imagine circumstances of graver provocation. If the prisoner Maithya had only

used such force as was necessary to protect his wife from the outrage to which she was being subjected, he would have been justified; and had he, while using such force, unintentionally caused the death of the deceased, the homicide would have been justifiable. He went, however, according to his own confession, much farther than this; and from the evidence of the Surgeon it appears that 15 ribs of the deceased were broken, each into several pieces. The deceased must, therefore, have been subjected to very great and long-continued violence, much more than could have legally been exercised by the prisoner Maithya in defence of his wife.

But as no weapon was used, as all the blows appear to have been struck while this prisoner was still under the influence of passion, and as there is nothing in his conduct, either previous or subsequent, which would lead us to suppose that this prisoner acted from any other motive than that of anger provoked in the manner above mentioned, we think that the homicide, though culpable, does not amount to murder; that it falls within the Exception 1 to Section 300 of the Penal Code; and that this prisoner ought to have been convicted accordingly.

With regard to the prisoner Esoff, the evidence is extremely meagre. He denies that he took any share in the attack on the deceased. But there seems no reason for discrediting the woman's statement; besides which, the extent of the injuries inflicted upon the deceased, and the fact that he is not alleged to have made any resistance, also lead to the conclusion that he must have been attacked and overpowered by more than one person.

On the other hand, there is no ground for supposing that the prisoner Esoff had any such criminal intention as would render him liable to be convicted of an independent crime of murder; and we think, therefore, that he also ought to be convicted of culpable homicide not amounting to murder.

With regard to the amount of punishment, we think the prisoners ought both to be sentenced to rigorous imprisonment for seven years. The prisoner Maithya received, no doubt, great provocation. But, on the other hand, he beat the deceased in a cruel and vindictive manner, which merits severe punishment. The prisoner Esoff had not the same provocation, but he is much younger. His age is only 18 years, and he probably acted to a considerable degree under the influence of the elder prisoner.

Vol. VI. We therefore alter the finding and sentence of the Court below.

We direct that the prisoners be acquitted of the charge of murder, and found guilty on the charge of culpable homicide not amounting to murder, under Section 304 of the Penal Code; and we sentence each of them to rigorous imprisonment for seven years.

The 24th July 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell,
Judges.

Murder—Evidence of accomplice—Corroboration—Misdirection.

The Queen *versus* Karoo, Rumnee, and Nundoo Khuttree.

Committed by the Deputy Magistrate of Behar, and tried by the Sessions Judge of Patna, on a charge of murder.

Held, in a case of murder, that the Judge had not given a proper direction to the Jury in telling them that it was for them to consider whether the evidence of the accomplice was strictly corroborated as to the prisoners; that it was not enough that the evidence should disclose a state of facts consistent with the possibility of the truth of the accomplice's story; and that the Judge ought to have gone through the history of the crime as detailed by the accomplice, to point out any independent evidence proving facts showing that the prisoners were or must have been present at, or cognizant of, the murder.

THE prisoners have been found guilty, at a trial before the Sessions Judge of Patna and a Jury, of the murder of a boy of twelve years old named Gopal. They have been sentenced to death, and the case comes before us for confirmation of the sentence.

Considering the youth of the prisoner Karoo, and the uncertainty we feel as to the circumstances under which the crime was committed, we think that a sentence of transportation for life will be a sufficient punishment for him.

We entertain very grave doubts as to the guilt of Rumnee and Nundoo.

We think it is proved that the murder took place in the deserted house adjoining that which is described as the house of Rumnee; that the deceased was killed by having his skull smashed, probably with the stone found there; and that the body was afterwards removed and put into a well in

the little court-yard close to the door of Rumnee's house. That well is close to the verandah in which the prisoner Karoo and his mother Jhoomiza resided. Karoo enticed the deceased from his uncle's house. His own admission, and the statement of his mother Jhoomiza, who was admitted a Queen's Evidence, prove, beyond any doubt that Karoo was guilty of, or abetted, the murder. His mother Jhoomiza, by her own evidence, was an accomplice. Both Jhoomiza and Karoo fled after the murder.

But, as it appears to us, there is nothing really to corroborate the evidence of Jhoomiza as to the participation of Rumnee and Nundoo in the crime.

Her evidence does not suggest any intelligible motive on their parts for the commission of the murder. Their object could not have been plunder, because the murdered boy's jewels were found upon his body in the well. It was apparently not revenge for Byejnauth, the uncle of the deceased, say: he had no quarrel with the prisoners. Their conduct after the date of the murder does not appear to be that of persons conscious of guilt. Rumnee, at any rate, from all that appears, was about his usual business although, with the usual neglect of police officers in this country, no distinct evidence is adduced on that subject.

We cannot make out, from the evidence recorded, that Nundoo had fled or concealed himself. If Rumnee and Nundoo had committed the crime, it is almost inconceivable that Rumnee should have placed the body in a dry well at his own door half covered with earth, so that the stench of the putrefying remains might have been expected to induce every dog in the neighbourhood to testify against him. Two men capable of such a crime would have had no difficulty in carrying the body off to a distance and concealing it.

If Karoo and Jhoomiza committed the murder alone, it may well be that a boy either of 12 or 15, and a woman, might not have had strength or nerve to carry off through a public road, and may have dropped it where it was found, from inability to remove it to a greater distance.

The imperfect manner in which the body was covered with earth appears more like the work of a woman or boy than of determined criminals, such as Rumnee and Nundoo must be, if the theory of the prosecution is well founded. The story, therefore of Jhoomiza appears, on the face of it, in high degree improbable. We may add that

as to the immediate circumstances of the crime as described by her, the story is inconsistent with itself. Whether she desired to avenge an old grudge on her former paramour, or to escape, by charging other people with the crime which she had committed, it may be difficult to say. But it must be borne in mind that either or both of these motives may have been present to her mind. What is there, then, to corroborate her story?

The Judge says that Ghunnoo, the oilman, saw Rumnee and Nundoo enter what he calls Rumnee's house, immediately after Karoo and Gopal.

Now, according to the evidence of Jhoomiza, Karoo took Gopal to the house of Rumnee, and led him over the wall into Gouree's house. She says, "Rumnee and Karoo followed immediately into that house." Ghunnoo says, "I saw Karoo come, and Gopal following him. They went inside Rumnee's house. When I got up to go in, I saw Rumnee and Nundoo go into the house."

Now, here is the point in the case—a point at which the prisoners' guilt or innocence—their lives, in short—depend on accuracy as to *seconds*. And yet the Judge did not put a single question to the witness to ascertain on what day of the month or week it was that he saw Rumnee and Nundoo following Karoo and Gopal, or at what time of the day. He leaves it utterly uncertain, what was the interval after which Rumnee and Nundoo followed—whether it was five seconds or twenty minutes. The loose and evidently inaccurate language of the witness, "it was immediately after," is not sufficient to satisfy *our minds* on this most important point. No question is put as to whether these men were within sight of the boys, or apparently watching them.

It must be remembered that, if the house was Rumnee's house, for all that appears, it was perfectly natural that he might have been seen on any morning going towards the door of his own house with Nundoo his fellow-workman; and there is nothing to lead to the inference that the day of the murder was the only time on which the two boys Karoo and Gopal had gone together to the house of Rumnee.

Upon the evidence, as it stands, it cannot be said to be proved that Rumnee and Nundoo followed Gopal and Karoo at so short an interval that we must *necessarily* infer that they were all together. The simple fact that the prisoners followed the

boys into the house cannot, under all the circumstances of this case, fairly be said to be a corroboration of Jhoomiza's story, because, though consistent with the statement that they were present at the murder, it is not inconsistent with the possibility that the boys may have gone over the wall into the deserted house, where the murder was committed, before Rumnee and Nundoo got into Rumnee's house; and more especially so, since, as we have shown, the facts afford a presumption that the murder was more likely to have been committed by the boy Karoo, or the woman and boy, than by two men such as the prisoners.

Next, the Judge says that, as regards Rumnee, the body was found in the well on his premises, and that the spot where the murder was committed has no communication with that well except by a public road, unless through his premises. The well is outside the door of his house, inside a little open courtyard open to the street in front of it.

We cannot conceive how any one could suppose that this is a corroboration. We find it simply impossible to imagine any set of circumstances under which the prisoners could be induced to place the body in such a position, though we can imagine that it might have been placed there by one who desired to fix a charge upon them. So far from being a corroboration, we think it tends to throw doubt on the story of the accomplice.

It appears to us that the Judge has not given a proper direction to the jury. To tell a body of seven native jurymen, as he did, that it was for them to consider whether the evidence of the accomplice was strongly corroborated as to the prisoners, was simply to ask them to consider a question which it was perfectly certain that native jurymen in the Mofussil would not understand. It was the duty of the Judge to go through the history of the crime as detailed by the accomplice, to point out any independent evidence proving facts showing that the prisoners were, or must have been, present at, or cognizant of, the murder. If such facts are proved, they would corroborate the story of the accomplice. But it would not be enough that the evidence should disclose a state of facts consistent with the possibility of the truth of the accomplice's story. If the state of the facts proved is *equally consistent with*, and capable of receiving, a reasonable and natural explanation on the hypothesis of the prisoners' innocence, *those facts, standing alone, would be no evidence*

Vol. VI. of the *truth* of the accomplice's story. The same principle would apply even in civil suits. It was acted on by the Court of Common Pleas in England, in the Midland Railway Company *vs.* Bromley, 25 Law Journal Common Pleas 94, and the Court of Exchequer, in Doe dem. Welsh *vs.* Langfield, 16 Meeson and Welsby 497 : much more, then, would such proof be insufficient as *corroborative evidence* in a criminal case, where the legal presumption of the innocence of every man till he is convicted has to be put in the scale against the construction which supposes the guilt of the prisoner. Of course, such evidence may be of great importance as a link in the chain of proof against a prisoner.

The case against Rumnee and Nundoo must go back for a new trial with reference to these observations.

The Judge appears to have wholly overlooked the inconsistency and self-contradiction of Jhoomiza's relation of the circumstances under which the prisoners appeared on the scene of the murder.

She first says, "Karoo *look Gopal* through Rumnee's house and *over the wall* into Gouree's. Rumnee and Nundoo followed immediately into that house. I was at the time in Rumnee's verandah, and saw them. I went to the house about a *ghuntee* after : *then Rumnee and Nundoo put Karoo over the wall*. I got over the wall : I there found Gopal struggling on the ground. I saw Rumnee beating him on the head with a stone. Nundoo was holding him by the throat : *my son Karoo, by the feet*."

This story, as detailed in evidence, is simply impossible. If Rumnee put Karoo over from the outside into Gouree's house, Karoo did not go with Gopal. If from Gouree's house they put him over the wall back into Rumnee's, Karoo could not have been present, holding Gopal's feet while Rumnee was murdering him.

We may observe, as regards the way in which the case has been tried, that the Judge has not attempted to elicit from the several witnesses the facts in that minute detail which might have been expected, considering the importance and difficulty of the case. Much evidence which would have been of great importance is wholly wanting. No account is given of the arrest of the several prisoners—of the discovery of the body by the Gorait of the bloody cap of the basket in which the remains are found. It is even left doubtful whether Rumnee lived in the house which is styled his, or not.

The Police seem to have been careless. The Deputy Magistrate seems to have been more ready to give a credulous assent to the tale of her who was probably the chief criminal, than to insist in following up all clues which might lead to a discovery of the truth—all indications which could throw light on the enquiry.

The Sessions Judge seems to have taken the leading facts mentioned in the abstract of the evidence as given by the Deputy Magistrate, and scarcely enquired beyond these, instead of going fully into and through the case, with the desire to get at all the facts throwing doubt on the prisoners' guilt, with as much care as at those which tend to convict them.

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The 26th July 1866.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Murder—Punishment.

Queen versus Tonoo and another.

Committed by the Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of murder.

The sentence of death reduced to transportation for life in a case of murder committed rather by way of retaliation for injury, than under the influence of any worse passion.

THE prisoners in this case have both been convicted of murder. On one has been passed the sentence of death, subject to the confirmation of this Court ; the other has been sentenced to transportation for life.

Both prisoners have appealed against their conviction and sentence, so that the whole case against both of them must be considered.

It appears that, in the village of Khoor-shal, in the district of Rajshahye, there lives a Mahomedan family, consisting of three brothers, Dholba, Onoor, and Jumoon, and their three wives, Piprah, Sokina, and Tonoo. The mother of the three brothers also lived in the same house. Piprah is the person whose death is the subject of enquiry in the present case. Sokina and Tonoo are the prisoners who have been convicted of murdering her. Piprah was the chief among the women, and had the general charge of the house.

On the day in question, the two elder brothers, Dholba and Onoor, went out early in the morning to plough, and their mother also left the house before the morning meal, and neither of these parties returned until after the murder had taken place. The only persons in the house, therefore, were the three sisters-in-law and the younger brother Jumoon, who was stone-blind.

Dholba, the husband of Piprah, the murdered woman, states that when he returned from ploughing, about half-past four in the afternoon, he went into the western house, and there found his wife lying on her right side, with her throat cut from ear to ear, and a bloody knife lying by her. He immediately called to his brother Onoor who was outside, and they gave the alarm, which brought several persons to the spot, and the Police were sent for. He says that the two prisoners were in the house engaged in drying paddy, and another witness states that the blind brother Jumoon was also in the house; but he does not state where, or what he was doing; nor does it appear that Jumoon was ever called as a witness, or made any statement with respect to the transaction. Upon the prisoners being asked about the occurrence, they at once confessed that they had murdered the deceased, that they had gone to her while she was asleep, and that Tonoo had held her feet, whilst Sokina had cut her throat; and this confession they repeated several times.

Several witnesses spoke of having seen a mark of blood on the edge of the cloth worn by Sokina, corresponding with the five fingers of the hand; and while the prisoners were in a room under surveillance until the Police should arrive, Sokina herself handed out her cloth that the neighbours might see that such was the case.

The prisoners were taken before the Magistrate on the following day, when they again confessed in substantially the same terms, and their confession was formally taken down a few days after.

Throughout, the reason assigned for the murder by the prisoners was that Piprah had a great aversion to them, that she did not give them sufficient food and clothing, and that she had falsely accused them of stealing a cloth.

At the trial, the prisoners withdrew their confessions, and stated that they left the house early in the day with their mother-in-law, and had gone to sift paddy in their uncle's house; that, when they left the house,

Dholba was in the house quarrelling with Piprah, and that they knew nothing further until news was brought them that Piprah was murdered; but that they had been persuaded and threatened by various persons, and induced to confess the murder.

The first question is whether the prisoners are guilty. The only direct evidence against them is undoubtedly their own confession, but there is no reason whatever for discrediting it. When they withdrew it, they substituted for it a story which is plainly contradicted by the indisputable facts of the case. There can be no doubt that they were in the house when the murder took place, and if they were not the guilty parties, they would at least be able to give some account of how the deceased came by her death.

About the case of the prisoner Tonoo, there is, therefore, no further question. She has been rightly convicted of murder, and she has been sentenced to the lowest punishment which the law has awarded to that crime.

Sokina has also been rightly convicted, but it remains to be considered whether the sentence of death which has been passed upon her ought to be affirmed.

By Section 302 of the Indian Penal Code, it is provided that the crime of murder shall be punished with death or transportation for life. The Legislature has not laid down any general rules for the application of these two kinds of punishment, but has left it to the discretion of the Court which has to pass or affirm the sentence to decide which of them shall be awarded. This is the discretion we have now to exercise, and, after mature consideration, we have come to the conclusion that, looking to the whole circumstances of the case, the interests of justice do not require that the prisoner Sokina should suffer the extreme penalty of the law. We know very little of the internal history of this family, all the members of it (as was natural) having given their testimony with evident reluctance; but there seems to us fair reason to believe that a petty tyranny had been exercised by the deceased which may have become extremely irritating. The conduct of the prisoners in having taken no steps whatever to conceal their crime, strongly indicates that the act was rather retaliation for some injury inflicted on themselves, than one prompted by any worse passion. There is nothing, it is true, which could for a moment be supposed to reduce the crime from murder

Vol. VI. to culpable homicide, but it does not appear to us to be a murder of the worst kind.

We have thought it right to state our reasons for not affirming the sentence of death passed in this case, but we are desirous not to be understood as laying down any general rules on this important subject, and particularly we do not wish to lend any support to the notion that a woman ought not to be hanged in any case. The Legislature itself, when it left this matter to the discretion of the Judge, no doubt was aware of the extreme difficulty there is in framing rules applicable to all cases, and we think that the safest course for Judges who have to administer this portion of the Criminal Law will be to act in the same spirit, and to decide each case on its own merits, without much reliance on previously decided cases which are supposed to be analogous.

For the reasons above given, the conviction of both prisoners will be affirmed. The sentence passed on prisoner No. 2 will also be affirmed: that passed on prisoner No. 1 will be reduced to transportation for life.

The 28th July 1866.

Present:

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Illegal Toll on public road—Act VIII. of 1851.

Criminal Reference by the Officiating Sessions Judge of Moorshedabad, under Section 434, Act XXI. of 1861, and Circular Order of the High Court, dated 15th July 1863, No. 18.

Narendronarain Sing and another,
Petitioners.

To justify a conviction under Section 6, Act VIII. of 1851, for illegal collection of a toll on a public road, the road must be a public road within the meaning of Section 2 of the Act.

Case. THE case is briefly as follows. These parties are accused of collecting a toll illegally on a public road. They are respectively the zemindar and ijaradar of the estate in which the road is situated. They allege, and it is not denied, that the road was made for the convenience of the public very many years ago, and that a small toll is

taken from hack-bullocks and hackeries, from the proceeds of which the road is kept in repair. It is not stated that this road leads to, or is connected with, any road on which a toll has been or can be imposed by the Government. The Deputy Magistrate has not found the defendants guilty of any specific act of extortion or illegal restraint, nor is any such charge preferred by any individual, or proved on the record.

They have been sentenced, under Section 6, Act VIII. of 1851, to pay a fine of 25 and 15 rupees respectively, or to suffer imprisonment for 15 days.

The whole order is illegal for the following reasons. That Act applies only to public roads, and is entitled "An Act to enable the Government to levy tolls on public roads and bridges." It is not shewn that this is a public road within the meaning of the Act as defined in Section 2, *viz.*, a road which has been made or repaired at the expense of the Government. The penal Clause of the Act is as special as the Act itself, and only refers to offences committed by authorized or unauthorized persons on public roads. Any illegal extortion of tolls, or prevention of persons passing along places where they have a right of way, is punishable under the Penal Code; but such offences are not proved in this case, and I, therefore, refer the case for the orders of the High Court.

Judgment of the High Court. In this reference, we agree with the Sessions Judge. The road in question is clearly not a public road within the meaning of Section 6, Act VIII. of 1851; and the conviction is, therefore, illegal. The sentence of the Deputy Magistrate is reversed, and the fines, if realized, must be refunded.

The 28th July 1865.

Present:

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Splitting of Offences—House-breaking by night—Theft.

Criminal Reference by the Officiating Magistrate of Dinagepore, under Section 434, Act XXI. of 1861.

Jogeen Pullee

versus

Nobo Pullee.

In a case of separate convictions and sentences for house-breaking by night and theft under Sections 457 and 379 of the Penal Code, the conviction and sentence under Section 379 were quashed, and those under Section 457 were upheld.

Case.—I have the honor to forward herewith, under Section 434, the proceedings of a case tried by Deputy Magistrate Moulvie Anwarudin, as I am of opinion that his order is an illegal one. He is a Subordinate Magistrate of the 1st grade, and is consequently not empowered to pass a severer sentence of imprisonment than six months for any single offence. In the present instance, the offender was caught almost in the act of house-breaking by night, and at the same time committing theft. The Deputy Magistrate charged him under Sections 457 and 379, and, convicting him under both Sections, sentenced him to a year's rigorous imprisonment. It appears to me clear that but one offence was committed, and although it could be brought under several Sections, and that it never was the intention of the law to allow cumulative punishments in cases of this sort, if the Deputy Magistrate thought six months' imprisonment inadequate, he should have forwarded the case to me under Section 277, Code of Criminal Procedure. The orders of the High Court are hereby requested on the subject.

Judgment of the High Court. We agree with the Magistrate that the Deputy Magistrate had no power to convict the prisoner of these two offences, *viz.*, house-breaking by night and theft, and, in accordance with a decision of the Full Bench of this Court given on the 9th of July last, we quash the conviction and sentence passed upon the prisoner for the offence under Section 379

of the Indian Penal Code. The conviction and sentence under Section 457 will stand. Vol. VI

The 30th July 1866.

Present :

The Hon'ble J. P. Norman and W. S. Seton-Karr, Judges.

Jurisdiction—Theft—Dacoity.

Referred under Section 434, Act XXI. of 1861, and Circular Order, dated the 15th July 1863, No. 18.

Shumbhoo Roy *vs.* Ajail Aheer and others.

A Deputy Magistrate has no jurisdiction to try and convict, as for theft, persons whose offence is in reality that of dacoity. He can only commit them to the Sessions.

The prisoners have been convicted and sentenced to two years imprisonment for theft by Moulvie Waris Ali, the Deputy Magistrate of Shahabad.

The Deputy Magistrate's decision shows that he finds that seven of the parties implicated, and, amongst them, the prisoners were armed with sticks, and formed a sort of body-guard to the four who were carrying off the grain. The prosecutor complained, and his witnesses proved, that these seven men attacked and compelled his party to retreat when they attempted to arrest the thieves.

The offence charged was thus within the definition of robbery in Section 390, and, as more than five persons were conjointly committing it, was dacoity as defined by Section 391. This is an offence which the Deputy Magistrate had no jurisdiction to try. He had therefore no power either to convict or acquit the prisoners, and could only commit them to the Sessions.

The conviction must be quashed. The Deputy Magistrate must again take up the case in order to see whether it should not be committed to the Sessions.

The same order is made in the case of Bhika Aheer.

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The 30th July 1866.

Present :

The Hon'ble J. P. Norman and W. S. Seton-
Karr, *Judges.*

Murder—Culpable homicide not amounting to murder.

Queen versus Fukeera Chamar.

Committed by the Magistrate, and tried by the Sessions Judge of Sarun, on a charge of murder.

Where a thief was caught house-breaking by night, with half his body and his head through the wall of a house occupied by none but women except the prisoner and his young idiot son, and where the prisoner suddenly caught up a sort of pole-axe, and with it struck the thief five times on his neck and nearly cut off his head. HELD that the offence committed by the prisoner was not murder inasmuch as it was committed in the exercise of the right of private defence; but that, as the prisoner inflicted more hurt than was necessary for the purpose of defence, he was guilty of culpable homicide not amounting to murder.

The prisoner has been convicted of murder, and sentenced to transportation for life.

He does not appeal, but the case has been sent up by the Sessions Judge to the High Court, and we deal with it under Section 404.

The deceased, about 12 o'clock at night, made a hole in the wall of the prisoner's house. The prisoner awoke and caught up a sort of pole-axe which was near him. He ran out of doors, and stopped before the hole. The deceased then had half his body and his head outside the hole. The prisoner seized deceased by the hair, struck him five times on the neck, and, in fact, cut his head nearly off. He says he did not recognize or know the thief. There were none but women in the prisoner's house except himself and his young son, an idiot.

We are of opinion that the prisoner's offence is not murder, inasmuch as it was committed in good faith in exercise of the right of private defence, and that, therefore, the case falls within the Exception 2 in Section 300 of the Indian Penal Code.

We think that the act of the prisoner is not completely excused under Section 103.

because the prisoner inflicted more harm than it was necessary to inflict for the purpose of defence. The prisoner is therefore guilty of culpable homicide.

There were houses at no great distance from that of the prisoner, the inhabitants of which did come up on his outcry, though too late to save the deceased.

But, considering that the house-breaking took place at so late an hour of the night that the prisoner might reasonably have apprehended that his own life must have been in danger if the deceased had got clear of the hole; that the prisoner had none but women with him in the house; that the dangerous weapon used was one hastily caught up and not deliberately chosen; and that the alarm and excitement produced by his determination to defend his house and his family to the very death might have, under all the circumstances, led any one to use greater violence than was absolutely necessary for defence, we think a light sentence sufficient. The prisoner has been some time in jail, and we sentence him to four months' imprisonment, to be computed from the 4th of this present month, the date of his sentence by the Sessions Court.

The 30th July 1866.

Present :

The Hon'ble J. P. Norman and W. S. Seton-
Karr, *Judges.*

Land Disputes Possession.

Criminal Jurisdiction.

Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated 15th July 1863.

Sabhee Sing and others.

Before a Magistrate can pass any order regarding possession of disputed land, he must observe the forms prescribed by Section 318, Code of Criminal Procedure.

We concur with the Sessions Judge. The Assistant Magistrate had no power to deal with the land at all, except under Section 318 of the Code of Criminal Procedure, and he was bound to observe the forms prescribed by that Section before he passed any order regarding possession of the land. That part of the Assistant Magistrate's order which gives possession of the land to the plaintiff, Odit Misr, is accordingly quashed.

The 30th July 1866.

Present :

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges*.

Imprisonment (in default of fine) — Unlawful assembly.

Criminal Jurisdiction.

Referred under Section 434, Act XXI, of 1861, and Circular Order No. 18, dated 15th July 1863.

Phoolman Tewary

versus

Satram Ojha and others.

A Subordinate Magistrate of the First Class has no power under Section 45 of the Code of Criminal Procedure to award any greater sentence of imprisonment in default of payment of fine than 6 weeks in the case of persons convicted of being members of an unlawful assembly.

The prisoners in this case have been tried before Mr. Gribble, the Assistant Magistrate of Sasseram, vested with the powers of a Subordinate Magistrate of the First Class, and convicted of being members of an unlawful assembly under Section 143 of the Indian Penal Code, and they were each sentenced to 6 months' rigorous imprisonment and a fine of Rupees 200 or, in default, to suffer 6 months' further rigorous imprisonment.

Mr. Birch, the Sessions Judge of Shahabad, has sent up this case under Section 434 of the Code of Criminal Procedure in order that the legality of the proceedings may be examined by this Court, and has pointed out that Mr. Gribble, as Subordinate Magistrate of the First Class, had no power, under Section 45 of the Code of Criminal Procedure, to award any greater sentence of imprisonment, in default of payment of the fine, than one-fourth of six months, or a month and a half.

We are of opinion that the sentence is legally wrong on this ground, and we direct that it be amended by substituting 6 weeks' imprisonment for 6 "months," in default of payment of the fine.

The 6th August 1866.

Present :

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges*.

Charge (Effect of dismissal of) — Riot — Trespass — Appeal.

Criminal Jurisdiction.

Referred under Section 434, Act XXI, of 1861, and Circular Order, dated 15th July 1863.

Queen *versus* Morly Sheikh.

A dismissal by one Court of a charge of riot against A may be a bar to A's trial by another Court on the same charge, but it does not extend to other persons not then before the Court which ordered the dismissal.

The dismissal by one Court of the charge of riot instituted by the Police is no bar to the trial by another Court of a charge of criminal trespass instituted by a third person, although the two charges may substantially refer to the same occurrences.

There is no right of appeal because the united sentences in three separate cases amount to more than a month's imprisonment.

We regret much that all the various cases referred to by the Sessions Judge had not been made over for disposal to one and the same tribunal, and we think the Magistrate somewhat to blame for not having perceived the nature of the cases, and for not having referred them to one and the same tribunal in the interests of justice. But we are unable to see our way to anything beyond the quashing of the sentence passed against Morly Sheikh for riot, *viz.* 15 days' imprisonment.

The complaint of riot having been dismissed as against this person by the Assistant Magistrate, Morly Sheikh is, we think, in all fairness, entitled to be not again tried and convicted of riot by any other Court. But the dismissal of the case as against him cannot extend to the cases of other persons not then before the Assistant Magistrate such persons having further, it appears, been separately accused by Talib Khan. The dismissal by one Court of the charge of riot instituted by the Police can be no reason why another Court should not, on a separate charge instituted by a third person, come to a different conclusion, even though the two charges — that preferred by the Police, and that preferred by Talib Khan may substantially refer to the same occurrences.

The charge of criminal trespass for which Morly Sheikh was sentenced to 15 days' imprisonment appears to us to have been altogether a separate offence, and we do not see that an appeal lay from this sentence, simply because, in a different case, the accused had been sentenced to a further punishment

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Vol. VI. on two counts, the three sentences altogether amounting to more than one month.

We do not think it would have been competent to the Sessions Judge to annul the sentences against Baser and Budai merely on the appeal of Morly, even if Morly had the right to an appeal. On the whole, as already observed, the only order which we think ourselves empowered legally to make is that the conviction and sentence against Morly for riot, and for riot only, be quashed.

All the other sentences must stand good.

The 6th August 1866.

Present :

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

Evidence (Police Reports).

Criminal Jurisdiction.

Reference by Mr. W. Ainslie, Sessions Judge of Patna, under Section 434, Act XXI. of 1861, and Circular Order No. 18, dated 15th July 1863, in the case of a conviction under Sections 173 and 188 of the Indian Penal Code.

Government *versus* Madun Dass.

Police Reports are not evidence except against the reporting Police Officer.

Case.—THE accused is a zemindar. He was called on to supply the place of an absconded chowkeedar; he neglected to do so, and subsequently he evaded a summons—at least, so the Police report. The Deputy Magistrate of Behar fined him Rs. 50.

No evidence was taken except the Police-reports, and consequently the conviction is bad.

A copy of my letter to the Deputy Magistrate is annexed with his explanation, which is not satisfactory.

I have repeatedly impressed upon Deputy Magistrate Syud Zainooddeen Hossein that Police reports are not evidence except against the reporting Police Officer, but I cannot get him to remember this. In fact, his explanation shows that he thinks Police reports can be received as legal evidence.

Under these circumstances, I send the case up to the High Court, in the hope that he may pay more attention to their remarks than he does to mine.

Judgment of the High Court.—We entirely concur with the Sessions Judge. The Police report is no evidence, and we hope the Deputy Magistrate will pay more attention to the remarks on this head repeatedly conveyed to him by the Sessions Judge.

The conviction is quashed, and the fine, if levied, is to be refunded.

The 11th August 1866.

Present :

The Hon'ble G. Campbell and W. Markby, *Judges.*

Police—Evidence.

Queen versus Bheem Manjee and another.

Committed by the Assistant Magistrate of Raneegunge, and tried by the Sessions Judge of Bancoorah, on a charge of false evidence.

The Police are not at liberty to bind witnesses over to appear a month after date.

Remarks on the insufficiency of the evidence in this case to warrant a conviction.

THE prisoners, men of the aboriginal tribe of the Sonthals, are charged with false evidence in regard to an accusation of ill-treatment made by them against certain Police Officers.

The prisoner Bheem was apprehended by the Police on a charge of dacoity, and search was made for property of which he was supposed to be possessed. He was, according to the papers of the case, apprehended and sent in on the 14th March, but did not reach the Court of the Assistant Magistrate of Raneegunge till the 19th; and the delay of five days has not been explained. On arrival he was sent to "Hajut," and the witnesses in the case did not appear for upwards of a month. It now turns out that the Police, instead of sending the witnesses in at once, had bound them over to appear on the 15th April following—that is, a month later—a most extraordinary and unexampled proceeding, which is wholly unexplained. The case came on before the Assistant Magistrate on the 16th April, and was eventually dismissed. The prisoner Bheem had, however, at that time accused the Police of torturing him with a view to extort a confession and compel the delivery of the property; and enquiry was made by the Assistant Magistrate respecting this latter charge.

It then appeared that Bheem had certainly been brought on a cart, suffering from bruises, and apparently unable to walk;

but that no notice had been taken at the time of the circumstance. On being sent into "Hajut," he had gone into Hospital for treatment, and remained there four days. The evidence of the Native Doctor of the Hospital was taken, and though his evidence is not in such detail as it might have been, it seems to have fully supported (so far as it went) the story of Bheem. The Doctor said that the patient, when brought in, was suffering from contusions, that his shoulders and joints were swollen, and that he had pain in his whole body, and marks as of blows of a stick on his back. He added that the man said at the time that he had been tortured with pincers, and his joints had been pressed. The Sub-Inspector and other Police Officers accused were then summoned, and the case was placed for enquiry in the hands of the District Superintendent of Police, who, after enquiry, charged his subordinates with causing hurt to extort confession, &c. under Section 230 of the Penal Code. Meantime, the principal accused, the Sub-Inspector (who had formerly served in the Magistrate's office), applied to the Magistrate of Bancoorah to have the case transferred to his own file from that of the local Assistant Magistrate, and the Magistrate transferred it accordingly.

Eventually, the Magistrate, after going into the case, expressed the opinion that the charge was false. He said, "The Sub-Inspector is a good, sensible, quiet young man, who was some few months an English writer in my office, and entered the Police a short time since. He is well connected, and held in esteem by his neighbours, while the accusers," he went on to say, "were persons of no character." He "thoroughly believed the defence, and disbelieved the prosecution." He accordingly dismissed the charge, and committed the accused and witnesses for perjury. Hence the present case.

The Sessions Judge of Bancoorah and Assessors have convicted the prisoners, and the Sessions Judge has sentenced each to 4 years' rigorous imprisonment. The Sub-Inspector and the Police Officers and Chowkedars, formerly the accused, are now the chief witnesses for the present prosecution. They wholly deny the alleged ill-treatment of Bheem. They seem to try partially to account for the marks on his body by saying that after his apprehension he made his escape, being pursued, resisted, and was captured by the use of some necessary violence. But if there be any truth

in their story, the injuries inflicted must have been comparatively trivial. They say that Bheem, after his capture, walked along perfectly well, and was sent in not materially suffering. They admit that they made no report of the escape and re-capture now related. They suggest, as a probable hypothesis, that, on the way in, another policeman who went in charge of the prisoners put them up to a false charge, and that, with that view, Bheem was brought in on a cart. The remaining evidence for the prosecution is that of three persons, residents of one of the several places in which Bheem alleges that he was maltreated, who say that, if there had been such maltreatment, they must have known of it, and they were aware of nothing of the kind. The Native Doctor gave evidence substantially the same as that which he had formerly given.

In this case, we are decidedly of opinion that the evidence does not justify the conviction of the prisoners for false evidence. We think the story of the police suspicious in the very highest degree. The whole story of the escape and the injuring of Bheem in re-capture was entirely suppressed till the accusation of torture was brought against them. But, even supposing it to be true, it would in no way account for the injuries said to have been received by Bheem. According to these witnesses, Bheem started for Ranceegunge well and perfectly able to walk.

On the other side, it would appear that he was brought in on a cart severely injured. The real question, then, is, which of these stories is true? Was he really in that injured state, or was he so well as the witnesses allege, and only shamming injury in pursuance of a design to accuse the police? The former hypothesis seems to us by far the most probable. There does not seem to be the slightest reason for impugning the truth of the Native Doctor's evidence; and, if it is true, it seems to support the prisoner's statement. What was the occasion of the five days' delay in bringing Bheem? Why was nothing said of his state, or pretended state, when he came in? And above all, what was the object of the extraordinary delay caused by the police in postponing for a month the time for the appearance of the witnesses? The whole proceeding looks in every way like a design to allow time for Bheem's partial recovery before he reached the station of the Assistant Magistrate, and for his complete recovery before he should be brought before that officer,

ol. VI. In order to sift the case, the Magistrate might well have obtained evidence as to Bheem's state when on the way into the station. Where is the policeman who brought him in the cart, and others who might have explained where he was and what his state was from the 14th to 19th March, how and where the cart was procured, and where he was put on it? On all this part of the case there is no evidence whatever. That some policeman not before the Court induced the prisoners to make a false charge, is a suggestion which is not supported by the least tittle of evidence, or by anything which could give it the least color of probability. That Bheem, a rude and simple Sonthal, should go through this elaborate acting, in view to a future false charge, is extremely improbable, and that hypothesis seems to be, in truth, conclusively negated by the fact that no such charge was brought forward at the time or for weeks afterwards. It was only in the course of his defence, taken after the long delay caused by the police, that Bheem told the story of his maltreatment.

On the whole case, we can see no sufficient reason for believing that the story told by the prisoners under trial, and on which the charge of false evidence was assigned against them, has been proved by any trustworthy evidence to be false. We think the prisoners are entitled to an acquittal, and, reversing the order of the Sessions Judge, we direct their release.

The 13th August 1866.

Present :

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges*.

Dacoity—Punishment (fine).

Queen versus Bhoja and others.

Committed by the Assistant Commissioner, and tried by the Deputy Commissioner of Singhbhum, on a charge of dacoity.

A sentence of fine only is illegal in a case of dacoity.

NINETEEN women who accompanied a body of persons engaged in a robbery of grain (under circumstances which made it dacoity), in hopes of picking up some grain, have been convicted by the Deputy Commissioner of Singhbhum of dacoity, and

sentenced to fines of 4 rupees each. The sentence is illegal, because, under Section 395, the sentence for dacoity must be of transportation for life, or of rigorous imprisonment, with or without fine. If the Deputy Commissioner thought a very light sentence sufficient for this crime, he might have imposed a fine with a short imprisonment of 14 days or a month.

We reverse the sentence as illegal. We do not think it necessary to call on the Deputy Commissioner to pass fresh sentences.

The 13th August 1866.

Present :

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges*.

Insanity—Procedure (by Magistrate).

Queen versus Dataram.

Referred under Section 434, Act XXV. of 1861, and Circular Order, dated 15th July 1863, No. 18.

Where an accused person was found after examination to be of unsound mind—Held that the Magistrate should not have proceeded to acquit the prisoner, and directed him to be kept in custody, but should have stayed further proceedings.

THIS is a case which has been sent up to us by Mr. Alexander, the Sessions Judge of Chittagong, under Section 434 of the Code of Criminal Procedure.

It appears that the prisoner named Dataram was brought up before Mr. Wilson, the Officiating Joint Magistrate of Chittagong, upon a charge of having attempted to commit suicide, under Section 309 of the Indian Penal Code.

The Magistrate caused the prisoner to be examined by the Civil Surgeon, who reported that, at the time of the commission of the act in question, he was of unsound mind, and incapable of knowing the nature of his act, and that he continued to be so at the time of the trial.

The Joint Magistrate proceeded to acquit the prisoner, and directed that he should be kept in custody pending the orders of the Government.

It is clear that this course is erroneous, inasmuch as, under Section 388 of the Code of Criminal Procedure, the Magistrate was bound to stay all further proceedings in the case.

We, therefore, quash the acquittal, and stay further proceedings.

The 13th August 1866.

Present :

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges*.

Compensation—Theft.

Criminal Jurisdiction.

Reference by Mr. H. C. Sutherland, Officiating Magistrate of Bockergunge, under Section 454, Act XXV. of 1861, and Circular Order, dated 15th July 1863, No. 18.

Jalil Munshi *versus* Farnan Hossein.

Compensation cannot be awarded, under Section 270 Code of Criminal Procedure, to a person charged with theft under Section 380 of the Penal Code.

Case.—This was a case of theft under Section 380 of the Penal Code.

The Deputy Magistrate in this case ordered a compensation of Rupees 25 to be paid to the accused under Section 270 of the Procedure Code.

The order of the Deputy Magistrate is clearly illegal, inasmuch as compensation can only be awarded under Section 270 of the Criminal Procedure Code in cases under Chapter XV.

This was a case under Section 380, the procedure for which is laid down in Chapters XII. and XIV. of the Code of Criminal Procedure.

As the High Court* have ruled that there is no appeal from an order awarding compensation under Section 270, I cannot interfere in the matter.

But I think that the order should be quashed.

Judgment of the High Court.—We agree with the Magistrate. The order is illegal, and must be quashed. If the 25 rupees have been paid to the accused, this must be refunded.

The 20th August 1866.

Present :

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges*.

Hurt—Abetment—Wrong conviction.

Criminal Jurisdiction.

Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated 15th July 1863.

Gour Gobindo Thakoor and another.

Case of a man knocked down by a blow behind the ear, and then hung up to a tree where he was found dead, in which the Magistrate convicted one of the prisoners of voluntarily causing hurt, and the other of abetting the same. Conviction quashed with a view to commitment of the parties implicated before the Sessions.

Seton-Karr, J.—The whole of the proceedings of the Joint Magistrate are extremely unsatisfactory and irregular. It is clear to me that Gour Gobindo and Radha Thakoor should never have been convicted of hurt by the Joint Magistrate.

If the evidence of the witness Wuzeer and of the boy Aralya is to be believed, Gour Gobindo struck the deceased, Dil Mahomed, a blow or slap which knocked him down, and then Gour Gobindo and others of the Thakoors, *without enquiry as to whether he was dead or not*, in haste hung him up to a tree, so as to make it appear that he had committed suicide. If Gour Gobindo actually killed Dil Mahomed with one blow, and then, with others, hung him up to a tree, Gour Gobindo himself would be liable to be indicted under Section 304 (latter portion) or 325 of the Penal Code; and the other Thakoors, who assisted him to hang up the corpse, would be liable to be indicted under Section 201 or 193 for "causing evidence to disappear" and "fabricating evidence."

If, however, the deceased was not actually killed by the blow, but was killed by the suspension, then Gour Gobindo himself, and also all the other Thakoors who took part in hanging him up to the tree, would be clearly liable to a charge of culpable homicide amounting to murder; for, without having ascertained that he was actually dead, and, under the impression that he was only stunned, they must have done the act with the intention of causing death, or bodily injury likely to cause death, and without the exceptions provided by the law; or they might have been committed for culpable homicide *not* amounting to murder.

The witness Wuzeer does not positively say that the deceased died at once when he

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* *Vide* Sudder Dewanny Adawlut Reports, 904 of 1863. Hume's Journal, Vol. I., p. 217.

el. VI. fell back with a gurgling sound, and it would be for a Judge and Assessors to say whether, on the evidence, they were satisfied that the single blow from Gour Gobindo killed Dil Mahomed at once, and that he was already dead when he was hung up; or whether they thought that his death was caused by his being hung up when he was yet alive. Of course, the difference in the view which a Court might take of the facts would greatly affect the verdict and the punishment, and as to this I give no opinion. In any view of the case, the accused, who are shewn to have taken part in the transaction, should have been committed to the Sessions either under Sections 304 and 325 and Sections 201 and 193, or else under Sections 302 and 304; and it is clear that, if Wuzer and the boy were properly examined and cross-examined, and if the Sessions Judge and Assessors could rely on their evidence, a conviction might ensue under some one or other of the above Sections, even though the body was so decomposed that the Medical Officer could not ascertain the cause of death.

We ought to quash the proceedings and sentences against Gour Gobindo and Radha Thakoor, and the Magistrate should take up the case himself, with a view to a committal of the two accused, and of any other persons implicated in the affair with reference to the above.

Norman, J.—The prisoner Gour Gobindo Thakoor has been convicted, by the Joint Magistrate of Mymensing, of voluntarily causing hurt to one Dil Mahomed, and sentenced to one month's rigorous imprisonment; and Radha Thakoor, for abetting the same, to 14 days' rigorous imprisonment.

According to the evidence of two eye witnesses, whose testimony the Joint Magistrate thinks reliable, Dil Mahomed was returning from the house of one Osman Mir Talookdar when he was met by the prisoner Gour Gobindo and other members of the family (Thakoors) who had been called by the prisoner Radha Thakoor. Dil Mahomed made some observation as to their encroaching on his land, and threatened to complain. Gour Gobindo struck him on the left ear, and he fell down. Upon this, all the Thakoors present, including the prisoners, took up his body, and hung it on a tree, where it was found dead a few hours afterwards. The case was reported at the Thannah apparently on the same day, Wednesday, the 2nd of May.

There is nothing to shew that Dil Mahomed was dead when his body was suspended to the tree. The witnesses do not say so, and probably could not have said so if the Magistrate had asked the question. In speaking of the hanging up of the body, they use a term which the Magistrate has translated "corpse." If the Magistrate had put the question to the Civil Surgeon, he would probably have been informed that it is most unlikely that the deceased should have been killed outright by the blow on the ear, and was actually dead when suspended, though he may have been insensible.

First, then, assuming that Dil Mahomed was not killed by the blow. The Thakoors appear to have come out in a body with the apparent object of attacking or getting up a quarrel with the deceased. Gour Gobindo knocked him down, and then all, without waiting to see whether he was alive or dead, hung him up on a tree, and thereby killed him. They should all have been put on their trial for murder. It seems to me that a Jury or Judge, on the facts, might fairly presume that they intended to do what they actually did, *viz.*, to kill him. I may observe that the evidence does not shew that the Thakoors endeavoured to revive the deceased, or that their conduct was that of men who, having found that Gour Gobindo had accidentally killed Dil Mahomed, full of regret and alarm, hung up the body with the object *merely* of saving their comrade by producing a false impression as to the cause of his death.

Suppose, *secondly*, that the Thakoors had no intention of killing the deceased, but, finding him insensible, without enquiry whether he was dead or alive, or giving him time to recover, under an impression that he was dead, hung him to the tree, and thereby killed him. It appears to me that they might all have been put on their trial, under Section 304, for culpable homicide not amounting to murder.

I think a Jury might fairly presume against them that they must have known that they were *likely by that act to cause death*. They did not know, they could not know, and thus took no pains to ascertain, whether Dil Mahomed was dead, and they must have known that it was possible that some spark of life still remained. If they really and *bona fide* did enquire, and, after examination, believed him to be dead when he was not dead, and killed him by hanging him, it is clear that all the party might be convicted under the 338th Section. The

hanging him up was at the least a rash act, and wholly inexcusable.

Lastly, supposing that the blow on the ear of Dil Mahomed killed him on the spot. I think it certain that the Civil Surgeon would have said, if asked, that a blow capable of causing the instantaneous death of an ordinary man must have been a very violent one. To strike such a blow in such a place is a violent and rash act; it caused such hurt as endangered (in fact, it destroyed) the life of Dil Mahomed; and the striker, Gour Gobindo, might, in my opinion, have been committed for trial either under Section 325 or under the 338th Section, if he did not intend to cause grievous hurt; and in this last supposed case, all the other Thakoor, in removing the body from the place where it had fallen when struck down by Gour Gobindo, and hanging it on the tree, appear to me to have caused the disappearance of evidence of the offence committed by Gour Gobindo, and might have been committed under Section 201 for causing the disappearance of evidence, or Section 193 for fabricating false evidence.

The Joint Magistrate would have done well to restrain the flights of his imagination, and dispose of the case simply on the evidence before him.

He says, "The *post mortem* examination gives no clue to the cause of death, and the evidence does not either. Any number of surmises might be hazarded. The accused cannot be held to have caused the death of the deceased."

Now, if the Joint Magistrate had let *surmises* alone, he would have had no difficulty in coming to the conclusion that if a man is knocked down by a blow behind the ear, is then hung, and is found dead upon the tree, that he died either from the blow or the hanging. It would be a very serious matter if an offender were to be allowed to escape because a too critical Joint Magistrate cannot determine at what precise point in the course of a series of acts of violence, each capable of producing death, an unfortunate man expired under the hands of those who were ill-using him. The Joint Magistrate should not have indulged in "any number of surmises" as to the cause from which death may have resulted, when there are obvious causes detailed in evidence to which the effects found to exist are referable, and from which they would have resulted in the ordinary course of nature.

The Joint Magistrate's view of the law, that the offence, if *proved*, is one of causing

hurt or criminal force, is wholly erroneous; and the sentence of one month's imprisonment on Gour Gobindo, and fourteen days' imprisonment on Radha, are simply and utterly absurd as a punishment for the offence.

We quash the conviction, and direct that the case be again taken up before the Magistrate of the District, who will enquire whether all the Thakoor present ought not to be committed for trial on any or all of the charges to which I have called attention. If there is a difficulty in ascertaining the facts, the accused may be convicted on alternative charges under Section 72.

The Magistrate will, no doubt, enquire whether the deceased really was, on the morning in question, at the house of Osman Mir, and whether, when he left, he was in good health and in his right senses.

The 25th August 1866.

Present:

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Murder (by consent) - Evidence.

Queen versus Anunto Rurnagat.

Committed by the Magistrate, and tried by the Sessions Judge of West Burdwan, on a charge of murder.

In a case of murder by consent. Held that evidence of consent, which would be sufficient in a civil transaction, is not equally sufficient in exculpation of a prisoner's guilt.

In this case the prisoner has been convicted, on his own confession, of the murder of his wife, and has been sentenced to death. It appears that he is 26 years of age, and that she, at the time of her death, was about 20; and that four months before the event occurred, which is the subject of the present enquiry, they lost their only child, a boy of 5 years old. Both the prisoner and his wife bore a good character: they were not in want of money, and there was no dispute between them.

The prisoner has never attempted to conceal his guilt, or to defend himself in any way from the charge of murder.

The story he tells us is that, being overwhelmed with grief for the loss of their

Vol. VI. child, he and his wife had determined to kill themselves; that for some weeks they wandered about the country, and that, on one occasion, he expressed his determination to kill himself, when his wife begged of him to kill her also, as she could not summon up courage to do it herself. He says that he then tested her sincerity by striking at her three times with an axe, but purposely missing her, and that as she never flinched, he was convinced she was sincere. Nevertheless, he determined not to kill her or himself then, and returned to the village from which he set out, to the house of one Nuffer, a wheelwright, at whose house Kanto the prisoner's brother was also residing. The prisoner himself, being a wheelwright, worked for Nuffer; and he says that, after being there 4 or 5 days, he and his wife saw a child so like the one they had lost, that they both began to weep, and that they then again resolved to commit suicide. He avers that the wife repeated her request that he should kill her before killing himself, and he says that he accordingly did so by striking her three blows with an adze. After having done this, however, he did not proceed to kill himself, but called his brother who took the adze from him, and he made no subsequent attempt on his life, but requested that the Police might be sent for. This was done, and the prisoner was taken before the Magistrate, where he made a full confession, and expressed his desire to be hanged, in which desire he has ever since persisted.

The prisoner, on his trial, made substantially the same statement as he did before the Magistrate. The Sessions Judge thinks that there is a discrepancy between the statements, because before the Magistrate the prisoner stated that his wife was asleep, whereas the statement at the trial would lead to the inference that she was awake when he killed her; but all he said before the Magistrate was that his wife and others were, on the night in question, sleeping outside the house, but he does not say that his wife was asleep at the time he killed her.

Three witnesses were called by the Sessions Judge—Nuffer, in whose house the prisoner and his wife were staying; Kanto, the prisoner's brother; and the Ghatwal who was sent for. Their evidence throws but little light on the matter, but there is in it this discrepancy, that the Ghatwal says that when he had seen the prisoner, he was always grieving, whereas Nuffer says that he had never seen either the prisoner or his wife lamenting or in grief. These witnesses express their opinion, from the position in which the body was found, that the woman must have been killed in her sleep.

We do not think the prisoner's story so improbable as that we are entitled to reject it. We are at a loss to account for his conduct in any other way than that he was acting under some violent emotion such as he describes. The only doubt in our mind arises from his having aroused his brother, after having killed his wife, without attempting his own life. But though his courage failed him at that moment, he never seems to have really changed his mind as to his desire to die, having ever since testified anxiety that he should be convicted and hanged.

But although the prisoner's story be true, still he is guilty of murder, unless he can be brought within the provisions of Exception 5 to Section 300 of the Indian Penal Code, which provides that "culpable homicide is not murder when the person whose death is caused, being above the age of 18 years, suffers death or takes the risk of death with his own consent."

The Sessions Judge was of opinion that this Section did not apply, because he was of opinion that the woman was killed whilst she was asleep.

But, admitting this to be so, still the question arises whether the prisoner had not reasonable grounds for believing that the woman was still a consenting party to her death. Assuming, as we do, that the prisoner's story is true, what possible reason could he have for thinking that she had abandoned the intention which she had once so clearly entertained, and had so long preserved, even if it were not repeated at the very time he struck her? If this had been a civil transaction, there would have been ample evidence of consent, and it can hardly be said that evidence which would be sufficient in a civil transaction is insufficient in exculpation of a prisoner's guilt.

We are of opinion, therefore, that there is sufficient evidence that the deceased suffered death with her own consent, to entitle the prisoner to the benefit of this Exception. Still, the prisoner is undoubtedly guilty of culpable homicide, and it remains to consider what punishment ought to be inflicted upon him under Section 304; and, taking all the circumstances of the case into consideration, we think a sentence of 15 years' transportation a proper punishment.

We, therefore, annul the conviction and sentence passed upon the prisoner, and in lieu thereof convict him of culpable homicide not amounting to murder, and order him to be transported for 15 years.

The 27th August 1866.

Present :

The Hon'ble J. P. Nortman and W. S. Seton-Karr, *Judges.*

Maintenance (of wife).

Criminal Jurisdiction.

Referred under Section 434 of the Criminal Code of Procedure, and Circular Order No. 18, dated the 15th July 1863.

Mussamut Jesmut

versus

Shoojaut Ali.

The inability of a husband and wife to agree to live together is no ground for decreeing a separate maintenance to the wife.

We concur with the Sessions Judge, and quash the proceedings. There is no evidence of habitual cruelty, and none whatever that the husband is unwilling to support his wife. The husband himself, on the contrary, expressly says that he is willing to support the applicant, but that she went off to her mother. The Magistrate's finding merely amounts to the existence of a disagreement between the husband and wife. He says they cannot agree to live together, but this is no ground for decreeing to the wife a separate maintenance. The order for maintenance is annulled.

The 27th August 1866.

Present :

The Hon'ble W. S. Seton-Karr, *Judge.*

Rape—Punishment.

Queen *versus* Jhantah Noshiyo.

Committed by the Offending Magistrate, and tried by the Sessions Judge of Kungpore, on a charge of rape.

The measure of punishment in a case of rape should not depend on the social position of the party injured, but on the greater or less atrocity of the crime, the conduct of the criminal, and the defenceless and unprotected state of the injured female.

From the direct evidence, and from the medical evidence, this appears, as the Judge says, to be a clear case of rape.

I see no reason to interfere with the sentence; but I cannot concur with the Judge's remarks that the social position of the party injured ought to guide a Court to the measure

of punishment to be inflicted on the party committing the injury. The measure of punishment should be proportioned to the greater or less atrocity of the crime, to the conduct of the criminal, and to the defenceless and unprotected state of the injured female, whether that female were a low native or a high European.

Moreover, I am not sure as to the girl's prospects in life not being injured.

The appeal is rejected.

The 27th August 1866.

Present :

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

Mischief.

Miscellaneous Case.

Ram Golam Singh, *Petitioner.*

The authority vested in the Criminal Court of punishing persons for acts of mischief is one which must be exercised with great caution, and it must be very clear, before conviction, that the accused has brought himself within the meaning of Section 425 of the Penal Code.

AFTER an attentive consideration of this case, we are of opinion that no sufficient reason has been shown for disturbing the proceedings of the Magistrate's Court on the ground of error in law.

The conviction has been affirmed by the Sessions Judge upon considerations somewhat different from those which influenced the Joint Magistrate, and, indeed, upon a different view of the case.

We are not prepared to say that we should have drawn the same inferences from the evidence that have been drawn below, nor have the proceedings been altogether unsatisfactory. But they do not, in our opinion, exhibit any such legal defect that we should be bound to set them aside.

The authority vested in the Criminal Court of punishing persons for acts of "mischief" is one which must be exercised with great caution, and it must be very clear, before conviction, that the accused has brought himself within the true meaning of the 425th Section of the Penal Code, otherwise this provision of the law will be frequently resorted to as a trenchant mode of deciding disputed civil questions of right.

This offence involves the intent to cause, or the knowledge of the likelihood of causing, *wrongful loss*. Wrongful loss (Section 23, Indian Penal Code) is "the loss, by unlawful means, of property to which the person losing it is legally entitled."

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Vol. VI. The question is whether the act done by the petitioner (the levelling, partial filling up, and cultivating of a water-course over his lands which conveyed water to the lands of the prosecutor) came within this definition. If it did, then it was a species of mischief to which the law (Section 430) assigns a specially severe punishment.

It is explained in Section 425 (Explanation 2) that the act constituting mischief may be one which affects the property of the person who commits it.

And it is evident that "means" in themselves lawful may be "unlawful," because of their tendency to injure others. Thus, the act of rendering this channel-bed fit for bearing crops would be unlawful if, in order to the doing so, the bed was filled up or raised in such a manner as the petitioner knew would obstruct the flow of water to the prosecutor's land—if the petitioner knew or believed that the prosecutor was entitled to have the water flow in that manner.

It cannot be denied there was some evidence of that knowledge, and we are by no means satisfied (if we may express an opinion at all upon the facts) that the act complained of was not done *mala fide* with the intention of infringing upon such rights.

We do not, therefore, think it is a case in which the Court is called upon to disturb either conviction or sentence, and we reject the application.

The 27th August 1866.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges*.

Master (Liability of).

Criminal Jurisdiction.

Referred under Section 434 of the Code of Criminal Procedure, and Circular Order No. 18, dated 15th July 1863.

Suffer Ally Khan

versus

Golam Hyder Khan, Newaz Ali Khan, and Beedvokee Domnee.

A master is not criminally responsible for the wrongful act of a servant, unless he can be shown to have expressly authorized it.

The conviction must be quashed. There appears to be no evidence that the accused Golam Hyder Ali and Newaz Ali actually gave an order to the third defendant to commit the damage complained of. The statement of the third defendant is not evidence

against them. No doubt, they are civilly responsible for the act of their servant, even if done without their express authority. But master is not criminally responsible for the wrongful act of the servant, unless he can be shewn to have expressly authorized such act.

The 27th August 1866.

Present:

The Hon'ble W. S. Seton-Karr, *Judge*.

Nikah Marriage—Sections 494 and 495, Penal Code.

Queen versus Judoo Mussulmanee and Beedhy Bewah.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Nuddea, on a charge of bigamy.

A Nikah marriage falls within the purview of Section 494 and 495 of the Penal Code.

I HAVE sent for the papers, and have read all the evidence on account of the comparative novelty and singularity of this case.

Of the facts there can be no question, and they are rightly explained by the Session Judge, and were within the province of the Jury. It is clear that Beedhy and Judoo, pretending to be mother and daughter, between them deliberately and deceitfully led Shabal Sheik into a marriage with Judoo in the life-time of the complainant Hyder Sheik whose house they left during his temporary absence. The marriage with Shabal was a "Nikah," but this does not appear to me to take the offence out of the purview of Section 494 and 495 of the Penal Code. The Assessors, who seem to be intelligent Mahomedan gentlemen, clearly did not think so; and a Nikah certainly appears to me to fall within the definition of those Sections. The framers of the Code could scarcely have intended to prevent second marriages by the wife during the life-time of the husband, and to punish persons who concealed the fact of the first marriage, while at the same time they left a loophole to persons against whom such facts were established, by allowing them to urge that the second marriage was only a Nikah and was no marriage at all. A Nikah is well-known and a well-established form of marriage with the Mahomedans.

This point is not urged in the petition on appeal, but it seems to have been considered by the Sessions Judge and also by the Assessors; and I see no reason to think that the conviction is not perfectly legal. The sentences are not too severe.

The appeals are rejected.

The 27th August 1866.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, Chief Justice, and the Hon'ble L. S. Jackson, Judge.

Land Disputes—Procedure.

Petition against an order of the Officiating Magistrate of Purneah, dated the 11th April 1866.

Amrithnath Jha, *Petitioner*,
versus

Ahmed Reza and Enayet Hossein,
Opposite Party.

Messrs. G. C. Paul and W. E. Peacock and Baboo Tarucknath Sein for Petitioner.

Messrs. R. V. Dwyne and C. Gregory for Ahmed Reza.

Mr. R. T. Allan for Enayet Hossein.

In a case of disputed possession of land under Section 318, Code of Criminal Procedure HELD that the Magistrate was wrong in not recording a sufficient proceeding showing the grounds upon which he was satisfied that the dispute was one likely to lead to a breach of the peace; and that, if the parties consented to waive that point by consenting to go into the whole question, the Magistrate was wrong in taking the title of one person as *prima facie* evidence of his possession, and throwing the onus on the other, and precluding that other from proving his title.

Peacock, C. J. —It appears to me that there is error in law in the Magistrate's proceedings in this case, and that the Magistrate's orders ought to be quashed.

Section 318 of the Code of Criminal Procedure says: "Whenever the Magistrate of the District, or other Officer exercising the powers of a Magistrate, shall be satisfied that a dispute, likely to induce a breach of the peace, exists concerning any land, premises, water, fisheries, crops, or other produce of land, within the limits of his jurisdiction, he shall record a proceeding stating the grounds of his being so satisfied."

Now, the Magistrate in this case appears to me not to have stated any sufficient ground for his being satisfied that a dispute concerning land existed which was likely to produce a breach of the peace. It appears that four persons (Koonjial Sing, who was an under-farmer, Brijolall Sing, who was alleged to be a farmer, and two others) had made complaints against Amrithnath Jha. The Magistrate recorded the following proceeding:—

"All these cases came before me on the appearance of both parties. It appeared that between Syed Ahmed Reza and Syed

"Enayet Hossein of the first part, and Amrithnath Jha, owner of milik, of the second part, a dispute regarding mal proprietorship and milik is going on, and both parties are instigating their dependants in order to harass each other, and there is no reason to hope for any cessation or discontinuance of the disputes and affrays from a mere enquiry into the cases above mentioned."

The Magistrate does not state why he was satisfied that this dispute regarding the land was likely to produce a breach of the peace. Now, what was the dispute with Amrithnath Jha? In all probability Amrithnath Jha was claiming to receive the rents from the ryots who were the persons in possession of the land, and the underfarmers or farmers made a similar claim. The Magistrate goes on:—

"It appeared expedient to strike off the files all these petty cases, and to set up and decide a case between the real disputing parties under Section 318 in order that the actual subject of dispute may be at once put an end to, and the agents of both parties approved of this proposition; therefore it is ordered that the cases be struck off the file, and the original proceedings be considered as the basis of the case under Section 318; and, inasmuch as both parties are present, it is not considered necessary to issue a summons, but their signatures are taken."

Now, supposing the agent's assent would sufficiently get rid of the objection founded on the Magistrate's omission to record a proper proceeding, what did the parties really consent to? They consented (in order to put an end to the disputes) to proceedings being taken under Section 318. The Magistrate having passed an order for proceeding under that Section, Amrithnath Jha merely declared by his signature that he was present in Court and aware of the notice which the Magistrate had issued, and therefore no further summons would be necessary. The case might therefore proceed as if Amrithnath Jha had been summoned. This took place on the 26th February.

Then Amrithnath Jha was made the first party, and Ahmed Reza the second party. No reason was given at the time why Amrithnath Jha should be made first party, and Ahmed Reza the second party; nor was any order to that effect then made or consented to by the parties. But the Magistrate, when he gave his final decision, explained his reasons for making Amrithnath Jha the first

Vol. VI. party, and throwing the *onus* of proof upon him.

It appears from a proceeding dated the 27th February that a number of documents were filed by the first party, and the Magistrate says: "Owing to the enormous number of documents filed by the parties, I find it impossible to go through them all in one day; and as the parties state that they have two cart-loads more of papers to bring, I think it better to postpone the case for the present." Those documents, of course, would not shew which person was in possession. They would only shew title. But the Magistrate says: "To prevent the parties from flooding the Court with irrelevant documents, I lay down the two following issues as those to be enquired into:

"1st.—What is the land in dispute, *i. e.*, in what place is it situated, and what are its boundaries?

"2nd. Who is at present in actual possession of the disputed land?"

It appears that the Magistrate never tried the first issue. He called upon Amrithnath Jha to put in the boundaries of what he claimed, but did not call on Ahmed Reza to put in the boundaries of the land which he claimed; or, if he did call on Ahmed Reza to do so, Ahmed Reza never put in the boundaries of the land which he claimed. Had he done so, it might have appeared that what he was claiming was part of Kantee.

In any case, the Magistrate has not settled what are the lands out of which the dispute has arisen which led him to believe that there would be a breach of the peace.

The second issue laid down by the Magistrate was, "Who is at present in actual possession of the disputed land?" Now, the ryots were probably the persons in actual possession of the disputed land. Probably what was meant was which of the parties is in receipt of the rents from the person in actual possession.

Now, title-deeds showing that Amrithnath Jha was entitled to hold lakheraj land in Soorjapore would not prove what lands were in dispute between the parties, and certainly would not show which party was in possession of the subject-matter of dispute. The Magistrate says, he will not look at the title-deeds. But then does he deal with the case throughout on the same principle? It is quite clear that, under Section 318, the matter of title ought not to be taken as *prima facie* evidence of possession, because, if title is to be taken as *prima facie* evidence of possession in determining questions under Section 318,

it would be necessary to enter into the question of title, and that would throw upon the Magistrate the very enquiry which it is the object of that Section to avoid, for the Section expressly enacts:—

"The Magistrate or other Officer as aforesaid shall, without reference to the merits of the claims of any party to a right of possession, proceed to enquire which party is in possession of the subject of dispute."

The Magistrate having by his order properly shut out the evidence of title by refusing to receive any papers which did not bear upon the issues laid down, ought first to have ascertained distinctly what was the subject-matter in dispute, and then, without reference to any question of title, have determined which party was in possession of it. Instead of doing that, the Magistrate, having precluded Amrithnath Jha from proving his title, proceeds to use matter of title as presumptive evidence of possession, and upon that evidence throws upon Amrithnath Jha the *onus* of proof. He says:—

"The second party, Syed Ahmed Reza and Enayet Hossein, are the recorded proprietors of the revenue-paying estate of Soorjapore. The legal presumption, therefore, is that they are in actual possession of that estate. If any one disputes this fact, the *onus probandi* lies on him. Amrithnath Jha disputes the possession of the zemindars as regards the estates mentioned in his statement. To put a stop to much violence and discord, I instituted the case under Section 318, and, seeing that the *onus probandi* lay on Amrithnath Jha, I made him the first party. The proofs he offers of actual present possession are worthless. He brings forward several ryots who produce very suspiciously correct pottahs and receipts for the present and a few preceding years; but whose evidence is confused and contradictory in some instances, proved false, and altogether unsatisfactory. It is clear that the first party is one of those unscrupulous men who at the time of the resumption proceedings obtained much milk land by allowing *mâl* land to be resumed in their name. As he has failed to prove his possession of any estate except Kantee, I do not call on the other party for any reply, but decide in their favor."

Now, he decides in favor of the second party on the presumption arising from title without allowing Amrithnath Jha to go into the question of his title from which a contrary presumption might have been drawn. If

Amrithnath Jha had been allowed to prove his title, the *onus* of proving possession might upon the same principle have been thrown upon the opposite parties. The Magistrate was wrong, therefore, in presuming possession from evidence of title or proprietorship, because he could not go into title. What he ought to have done was to have confined himself to ascertain what was the subject of the dispute which he was satisfied was likely to produce a breach of the peace. If the Magistrate was unable to satisfy himself who was in actual possession, he ought to have proceeded under Section 319, which provides :

"If the Magistrate or other Officer as aforesaid shall decide that neither of the parties is in possession, or shall be unable to satisfy himself as to which person is in possession of the subject of dispute, he may attach the subject of dispute until a competent Civil Court shall have determined the rights of the parties or who ought to be in possession."

It appears to me that the Magistrate was wrong first in not recording a sufficient proceeding showing the grounds upon which he was satisfied that the dispute was one which would lead to a breach of the peace. If the parties consented to waive that point by consenting to go into the whole question, the Magistrate was wrong in taking the title of one person as *prima facie* evidence of his possession, and throwing the *onus* on the other, and precluding that other from proving his title. In fact, the question of title was no part of the subject for the Magistrate's consideration, and he was wrong in going into it at all. All that he should have done was to confine himself to the question of possession.

The Magistrate has erred in law, and his orders must be quashed.

Jackson, J.—I also think that it would be quite impossible for us to allow the orders of the Magistrate to stand as they now stand, and I think so both by reason of the want of jurisdiction apparent in the commencement of the proceedings, of the uncertainty as to the matter to which his order relates, and also on account of the defective mode in which the matter has been investigated. We certainly are not shown that it appeared to the Magistrate that a dispute likely to occasion a breach of the peace existed in respect of all the milik lands claimed by Amrithnath Jha; and if the parties, as has been stated in the proceedings of the Magistrate, agreed to any such enquiry as he has instituted,

then certainly he must be understood to have agreed to it, with the reservation that the subject of the dispute was to be ascertained, that it must be something definite, and that the enquiry was to be carried on in a lawful manner.

The Magistrate had before him certain definite questions arising out of specific complaints. Certain persons, one of them a moostagir, another a dur-moostagir, and others under various designations, alleged that, in some way or other (we do not know exactly what), they had been dispossessed or molested in connection with specific portions of land.

But the Magistrate substituted for these definite questions a very large and indefinite question relating to disputes between the parties complained against in these cases, and another altogether different person, the zemindar of the pergunnah.

The Magistrate has made this substitution for reasons of supposed convenience, but the real inconvenience resulting from the course he took will be readily apparent.

As far as I understand the matter, it would seem that Amrithnath Jha brought forward certain persons whom he alleged to be his ryots on the land in dispute. Apparently the zemindar brought forward certain other persons whom he alleged to be his under-tenants or the under-tenants of his farmers, so that really, and in point of fact, there must have been a double question of possession. There must have been a doubt who were the cultivating occupant ryots, and another as to who were the persons entitled to receive the rents. It was impossible for such questions to be disposed of in the summary way in which the Magistrate dealt with them.

I quite concur also in the observations of the Chief Justice as to the improper mode in which the *onus* has been thrown on Amrithnath Jha in this case, and of the erroneous presumption of which the opposite party has been allowed the benefit.

It appears to me that, if proceedings such as these before us were allowed to stand, the greatest inconveniences and the greatest irregularities would arise.

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The 29th August 1866.

*Present :*The Hon'ble J. P. Norman, *Judge.*

Summing up of Judge—Irregularities.

Queen *versus* Mohabur Singh.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of rioting, &c.

Remarks on certain irregularities of the Sessions Judge in his summing up.

THE prisoner has been convicted, on a trial before the Sessions Judge at Patna, sitting with a Jury, of the offence of rioting with other persons armed with deadly weapons, and abetting the voluntarily causing grievous hurt which was then and there caused in consequence of such abetment, and sentenced to 5 years' rigorous imprisonment.

On appeal many objections have been taken by the prisoner's vakeel.

First.—The Sessions Judge, in his summing up, says: "The prisoner's mookhtear has alluded to the absence of the other wounded persons who formerly appeared to give evidence. To these facts you will attach what weight you please. I must, however, point out to you that what is said for the prosecution, *viz.*, that the other witnesses have been bought over, may quite possibly be true, at least in my opinion. You can judge for yourselves whether a lapse of two years, when anger has cooled down an injured man, may or may not be likely to be bought over."

The statement was *singularly unfair* to the prisoner. The statement of the mookhtear employed for the prosecution was a wanton defamation of absent men who could not defend themselves, which should have been instantly and sternly checked by the Sessions Judge. There is not a particle of evidence to warrant it. The prosecutor was questioned by the Court, and admitted that *some of the witnesses denied the prisoner's identity with Mohabur Singh engaged in the riot.* He said that, when they did so, he replied that there were sharers in the village who could swear to him. Therefore, at an early stage of the case, the prosecutor had the full opportunity of warning that if the

called, remarks would be made. Instead of allowing the prisoner the benefit of the admission made by the prosecutor, that some of the persons present did not think that the prisoner was the Mohabur, the Sessions Judge actually adopts the wanton and unfounded assertion of the mookhtear, for the prosecutor himself never said anything of the sort.

It was a perfectly legitimate topic for the defence that the other wounded persons were not called, and that the sharers in the village whom the prosecutor mentioned as being able to swear to the prisoner were also not called. Their absence made it clear that, however certain the prosecutor might be as to the prisoner's identity, many persons not only present but wounded at the riot were of opinion that the other Mohabur was the rioter. The only proper answer which the prosecution could make was that these witnesses were not called by the prisoner.

Secondly, it was objected that the proceedings in the Civil Court in the suit by Jaffier Ally against the prisoner and his brother Oodit Singh were not admissible in evidence. But this is a complete mistake. They are not only evidence, but evidence of the greatest possible importance. They show that the prisoner was being sued for a division of the grain at the time of the riot, when it was forcibly carried away by Oodit and his party; that judgment passed against the prisoner and Oodit jointly; that the prisoner absconded; that his properties were attached; and that his wife, or a person so describing herself, paid the amount of the decree to save the property from sale.

I must further observe that the Sessions Judge repeatedly alluded to Oodit as "previously convicted." If it was necessary to allude to the convictions of Oodit, as was no doubt the case, the Judge, instead of reiterating, and, as it were, laying stress on the fact of his conviction, should have told the Jury that they must try the present case on its own merits, and warned them not to allow the fact of the conviction of Oodit to influence their minds; that it proceeded on evidence not before the Court in the present case, and that the prisoner was not represented in Oodit's case.

As a matter of fact, there is abundant evidence in the present case to justify the conviction of the prisoner, and I entertain no doubt of his guilt; and therefore, although the irregularities alluded to have been properly brought to the notice of this Court, they do not, in my opinion, make it necessary or pro-

The 31st August 1866.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, Chief Justice, and the Hon'ble J. P. Norman, F. B. Kemp, W. S. Seton-Karr, and G. Campbell, *Judges*.

False Evidence—Alternative Finding—Section 32, Act II. of 1855.

Criminal Appellate Jurisdiction.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Sarun, on a charge of giving false evidence.

Queen versus Mussamut Zumeerun.

Where a witness intentionally gives false evidence, and it is doubtful whether the false statement was made before the Magistrate or before the Sessions Judge, the witness may be convicted of the offence of giving false evidence upon an alternative finding (Norman and Campbell, *J.*, *dubitantibus*).

The deposition voluntarily given before the Sessions Judge is admissible in evidence against the witness, to show the falsehood of his deposition before the Magistrate, anything in Section 32, Act II. of 1855, notwithstanding (Campbell, *J.*, *dissentiente*).

This case was referred to a Full Bench by Norman and Campbell, JJ., with the following order :

Referring order. We are disposed to think that, under Section 381 of the Code of Criminal Procedure, the Court in passing judgment must distinctly specify the offence of which the accused person is convicted, and that it is only when the same facts constitute or form a part of an offence under one or other of two Sections or under one Section, and the Court, from imperfect information, is unable to say under which head the offence falls, that it can pass judgment in the alternative. We doubt whether a finding that *A. B.* on two different days made inconsistent statements on oath, is a sufficient specification of the offence. It may be that a charge may be so framed under Section 242 in order to guard against the contingency of the Magistrate committing on one charge, and the Judge thinking the other proved, but that the Sessions Judge is bound to state which of the two he believes to be proved.

There is another point in the case on which Mr. Justice Campbell entertains a strong opinion.

As the point is of importance, and as there is a Circular Order which, we understand, is in conflict with some decisions of the Court, we would suggest the case should be heard before a Full Bench of five Judges.

Full Bench Judgments.

Campbell, J.—A case of culpable homicide occurred in the district of Sarun. Chundee

Sookhul was charged with the offence, and was sent in by the Police to the Magistrate upon the charge of culpable homicide not amounting to murder. In that case, the present appellant, Mussamut Zumeerun, was sent up by the Police to the Magistrate as a witness. Before the Magistrate she deposed that she had seen the prisoner Chundee beating the deceased Beebun with his fiddle bow, and also that she had seen the marks of beating on the corpse.

After making the usual preliminary enquiry, the Magistrate committed the prisoner Chundee Sookhul for trial before the Sessions Judge. At the Sessions trial, the appellant Mussamut Zumeerun was again produced as a witness for the prosecution. On that occasion she deposed that she never saw the prisoner Chundee strike the deceased Beebun during the above time, namely, six months, or on any occasion, and that she did not see any marks of beating on the corpse. After the trial of Chundee Sookhul, the present appellant Mussamut Zumeerun was committed to the Sessions on two charges: *1st*, Intentionally giving false evidence in a judicial proceeding before the Sessions Judge of Sarun on the 18th December 1865; and, *2ndly*, Intentionally giving false evidence in a judicial proceeding before the Officiating Joint Magistrate of Sarun on the 14th October 1865. The perjuries assigned on these two charges were the statements, already noticed by me, made before the Sessions Judge and the Magistrate respectively. The only evidence which was submitted to the Sessions Court by the prosecution in support of these two charges consisted of the evidence of Doma Chupprasee, who proved the correctness of the record of the deposition of Mussamut Zumeerun made on oath before the Magistrate, and the evidence of Sadabut Hossein, Mohurir of the Sessions Court, who proved the correctness of the record of the evidence by Mussamut Zumeerun before the Sessions Judge. These two witnesses constituted the whole proof for the prosecution; but there was also some evidence for the defence, consisting of Bikarree Kahar, who says, "I know the prisoner; she gave false evidence in the Magistrate's 'utcherry,'" and Sheosulal Mallee, who says, "I know the prisoner; she gave false evidence before the Magistrate."

On this evidence, the Judge has convicted the prisoner, not of one charge or of the other, but alternatively, namely, that she either intentionally gave false evidence in a judicial proceeding before the Judge, or that she intentionally gave false evidence in a judicial

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Vol. VI. proceeding before the Magistrate. In the view of the Judge, the deposition before the Magistrate was evidence to show that the deposition before the Judge was false, and the deposition before the Judge was evidence to show that the deposition before the Magistrate was false. On this, Mussamut Zumeerun appeals to this Court.

The case came before a Division Bench consisting of my brother Norman and myself, and, having doubts regarding the case, we referred it to a Full Bench.

We had, in the first place, some doubts whether, under Section 381 of the Code of Criminal Procedure, it was not necessary for the Judge, in passing judgment, to specify the offence of which the accused person is convicted, and whether it is not only when the same facts constitute or form a part of an offence under one or other of two Sections, or under one Section, and the Court, from imperfect information, is unable to say under which head the offence falls, that it can pass judgment in the alternative. We doubted whether the law enables a Judge, in such a case as the present, to convict of either of two charges of false evidence in the alternative, when the facts constituting one of the alternative offences are wholly different from and opposed to those constituting the other alternative offence.

Another doubt was whether, with reference to the provisions of Section 32, Act II. of 1855, the evidence given by Mussamut Zumeerun before the Magistrate and before the Judge respectively could be used as evidence against her in support of a criminal charge of false evidence given upon another occasion than that on which the evidence so used was given; Mussamut Zumeerun not having put herself forward as a witness of her own accord, but having been summoned, and in a manner compelled to give evidence first before the Magistrate and then before the Judge.

With reference to the first point of doubt noticed by the Division Bench, I in some degree concur in the doubts which were suggested by my brother Norman. I am not by any means clear upon the point. I will only express some doubts, and I believe my brother Norman will more clearly express his views on that particular point.

But with regard to the second point—the construction of Section 32, Act II. of 1855—I have a strong opinion which I will now proceed to express. Section 32 is as follows: “A witness shall not be excused from answering any question relevant to the matter in issue in any suit, or in any civil or criminal

proceedings, upon the ground that his answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind; provided that no such answer which a witness shall be compelled to give shall, except for the purpose of punishing such a person for wilfully giving false evidence upon such examination, subject him to arrest or prosecution, or to be used as evidence against such witness in a criminal proceeding.”

In cases of false evidence formerly tried by me, I have expressed the opinion, with reference to the above provision, that, although the evidence of a witness taken before a Magistrate may be used to prove his subsequent perjury before the Judge, the evidence taken before the Judge cannot be used to prove a prior perjury before the Magistrate; that, consequently, when there is no other evidence on the record, a charge of false evidence before the Magistrate, only supported by the subsequent evidence of the same witness before the Judge, must fall to the ground. If so, an alternative conviction that the accused has committed one of two offences, of which the not-to-be-supported charge of false evidence before the Magistrate is one, cannot be sustained. Whether the conviction be on a single charge or a double charge, no charge can be supported without some evidence of some sort.

As respects the charge of giving false evidence before the Judge, although the wording of Section 32 of the Act might leave some room for doubt, I do not think it could have been intended to protect a witness against subsequent perjury; and, understanding that the other Judges of this Bench fully agree with me on the point, I may now hold, with confidence, that the evidence of a witness taken before the Magistrate may be used as *pro tanto* evidence on a charge of subsequent false evidence before the Judge.

As respects the other charge of false evidence before the Magistrate and the question of the admissibility, as evidence against the prisoner, of his subsequent evidence before the Judge, it seems to me that the policy of the law on this latter point is clear. The old English rule was that no one was compelled to criminate himself, and no man was obliged to answer a question if his answer would expose him to the risk of criminal proceedings. This system was attended with many inconveniences, and the Indian Legislature, by Act II. of 1855, adopted another rule. Section 32 enacts that no witness shall be excused from

answering any relevant question on the ground that the answer will, directly or indirectly, criminate such witness, or expose him to a penalty of any kind: but then it goes on to provide that "no such answer, which a witness shall be compelled to give, shall, except for the purpose of punishing such person for wilfully giving false evidence upon such examination, subject him to any arrest or prosecution, or be used as evidence against such witness in any criminal proceeding." Witnesses are bound over and compelled to give evidence at a Court of Session, and, as I understand the present law, if a witness were to object, "I cannot state the truth, for that would disclose that I committed a murder, or that would disclose that I gave false evidence on a former occasion," the Judge would explain, "You need be under no apprehension: you *must* answer, but nothing that you say can be used against you in order to convict you of the murder or the false evidence on the prior occasion. You may therefore speak out without fear." If that be not the meaning of the law, I am quite unable to understand what is the meaning. It seems to me that a witness compelled to appear in a Sessions case is protected from any use against him of the evidence which he gives, and that such evidence cannot be used against him in a criminal prosecution to prove that he committed perjury on a former occasion. If it were otherwise, witnesses who had committed themselves to certain statements, when first carried by the Police before the Magistrate, would be no longer free agents. They would go into the witness-box with haliers round their necks. If they venture to speak freely, they may immediately be committed on an alternative charge of this kind without further evidence. The absence of any other evidence implies that, if they stick to their original story, they are safe: but, if they say that which may be the truth, they are forthwith liable to be indicted for perjury. If they give false evidence at the Sessions, by all means prove the charge, and punish them. But to punish them on an alternative finding which necessarily implies that the evidence before the Sessions may be true, without any other evidence to the prior perjury than the privileged evidence which they are compelled to give, seems to me contrary to the letter and the policy of the law. If that be lawful, Sessions trials must become a farce--witnesses have no option but to repeat the story once told to the Police and the Magistrate. I do not think that it makes any difference that the witness

did not go through the form of refusing to answer, and being told by the Judge that she must answer. She was, I think, in every sense compelled to give evidence. She was compelled to appear before the Sessions Court, and, being there, the law by penal enactments compelled her to give evidence.

Therefore, in my opinion, in this case, the evidence taken before the Judge was improperly and wrongfully used in support of the charge of false evidence given before the Magistrate, and a conviction founded upon that evidence only cannot be sustained.

The present case is somewhat complicated by this, that the prisoner has in some sort supplied what may possibly be considered evidence upon this head of the charge—that is to say, the charge of false evidence before the Magistrate—inasmuch as two of her witnesses have stated before the Court: "I know that Mussamut Zumeerun gave false evidence before the Magistrate." But it seems to me that a statement of this kind without any particulars as to which the witness pledges himself to his means of knowledge is no evidence, and certainly is totally insufficient evidence on which to convict a prisoner of giving false evidence.

In my opinion, the conviction ought to be quashed and a new trial ordered.

Norman, J. I do not think that the first point in this reference is by any means clear. For myself, I still feel the doubts which are expressed in the order referring the case. Section 381 says that the Court shall *distinctly specify the offence of which and the Section of the Indian Penal Code under which the prisoner is convicted, or if it be doubtful under which of two Sections the offence falls, shall distinctly express the same, and pass judgment in the alternative according to Section 72 of the Code.* I should still doubt whether a finding "that a prisoner either gave false evidence before the Magistrate on the 1st of February, or else, if that evidence be true, gave false evidence before the Judge on the 1st of May," can be properly said to *specify the offence of which the prisoner is guilty.* It is very important that there should be a definite and well-understood rule on the subject, and I am quite satisfied to abide by the judgment of the majority of the Court.

On the other point raised by my brother Campbell, it appears to me perfectly obvious that one who makes a criminal charge against another cannot protect himself from a cross-examination on the direct question whether the charge was true or false, on any pretext

Vol. VI. whatever. Even assuming, for the purpose of argument, that such a person could protect himself, still, if he answered voluntarily and without claiming protection, his answers would be admissible against him, and would not be excluded by the 32nd Section of Act II. of 1855, because it would not be "an answer which the witness had been compelled to give" within the meaning of that Section. Indeed, if the witness claimed protection in such a case, and said in substance, "I refuse to answer, because the answer, if I speak the truth, will convict me of perjury before the Magistrate," the objection would be almost as strong evidence against him as if the witness had admitted by a direct answer that his former statement was false.

If, then, evidence given in a subsequent case, in answer to cross-examination and undue pressure, would be receivable as against the witness to show that his former statement was false, much more must it be admissible when the subsequent deposition of the witness is given voluntarily and without pressure of any sort, as in the present case.

A subsequent deposition has always been received both in England and in this country as evidence upon a charge of perjury to show the falsehood of the former contrary deposition by the same witness. There are numerous cases on the point; and the propriety of admitting such evidence has never, as far as I am aware, been questioned by any one except my learned brother Campbell in this case.

Peacock, C. J.—I have no doubt that there may be an alternative finding as well in a case in which the evidence proves the commission of one of two offences falling within the same Section of the Penal Code, and it is doubtful which of such offences has been proved, as in one in which the evidence proves the commission of an offence following within one of two Sections of the Penal Code, and it is doubtful which of such Sections is applicable.

This appears to me to be quite clear when Section 381 of the Code of Criminal Procedure is read together with Section 242 and Clause 5, Section 382 of that Code.

A swears before a Magistrate that he saw the prisoner kill *B*. The prisoner is committed to the Sessions for trial for murder. *A* on the trial swears that he did not see the prisoner kill *B*, and the prisoner is acquitted. *A* is in consequence committed for trial for giving false evidence, and two charges are framed against him under Section 242, Code of Criminal Procedure—

1st.—That he intentionally gave false evidence before the Magistrate by swearing that he saw the prisoner kill *B*.

2nd.—That he intentionally gave false evidence before the Sessions Judge by swearing that he did not see the prisoner kill *B*.

The Sessions Judge finds that the prisoner intentionally gave false evidence, but that it is doubtful whether the statement made before the Magistrate or that made before the Sessions Judge was the false one. If the prisoner was innocent, and the statement before the Magistrate was false, the prisoner has in consequence been improperly committed for trial on a charge of murder, and has suffered all the degradation, annoyance, and anxiety of being committed on a false charge. If the prisoner was guilty, and the witness in consequence of bribery or other cause has sworn falsely before the Sessions Judge, the administration of justice has been defeated, and a murderer has been acquitted. It is clear that, unless the law is very defective, or we are to trifle with the administration of justice, *A* ought to be punished. It appears to me that the law is not deficient, and that the case is provided for by the Code of Criminal Procedure, whether it be read according to the strict letter or according to its spirit.

In such a case it would seem clear that the Magistrate was right in framing a charge containing two heads, under Section 242.

The Sessions Judge would also be strictly within the letter, as well as the spirit, of Sections 318 and 382. Clause 5, in finding that *A* is guilty of the offence of intentionally giving false evidence, and that he is guilty either of the offence specified in the first head or of the offence specified in the second head of the charge, and is convicted of an offence punishable under Section 193 of the Penal Code. The words in Clause 5, Section 382, which follow the word "namely," are clearly given only as an example, and it is clear that, without an example of a case falling within the latter branch of Section 242, such a case falls within the strict letter of Clause 5, Section 382.

The other point upon which Mr. Justice Campbell is stated in the reference to entertain a strong opinion is, as I understand him, that the statement made by the prisoner before the Sessions Judge was, in consequence of Section 32, Act II. of 1855, inadmissible against the prisoner in a criminal proceeding, except for the purpose of punishing her for wilfully giving false evidence upon such

Judge. The witness was not compelled to give evidence before the Judge, and therefore the question does not arise whether she would be protected from a charge of giving false evidence in her examination before the Judge, if she had been compelled to give evidence. Whatever opinion may be entertained upon that point, there can be no doubt that the evidence given before the Magistrate was admissible to prove that the evidence given before the Judge was false. The prisoner could not have been excused from giving evidence before the Magistrate upon the ground that her answer might criminate her in respect of the evidence which he might afterwards give before the Judge. The prisoner is charged with giving false evidence upon her examination before the Judge, and upon that head of the charge the statement made before the Sessions Judge, as well as that made before the Magistrate, are evidence, the former to prove that the prisoner made the statement, the latter to prove that the statement was false within the knowledge of the prisoner. But the statement of the prisoner made before the Judge, when used as evidence against her, is also admissible in her favor, if the Judge believes it. The Judge, taking the two statements together and the prisoner's plea of not guilty, which in substance denies that she intentionally gave false evidence before the Judge, says: "I cannot determine which of the statements is false. I cannot, upon the strength of the first statement alone, find that it is contradicted by the second, or say that the second is false. But, giving the prisoner the benefit of the doubt which has been created in my mind by the fact of the contradiction of the first statement by the second, I cannot say that the second is false. I can say that one or the other of the two statements was false within the prisoner's knowledge. Looking, therefore, at the evidence which has been given in support of the charge that the second statement was false, I am doubtful under which of the two heads of charge the offence falls. I can only say that the prisoner has been guilty of intentionally giving false evidence. I cannot say that she is not guilty of intentionally giving false evidence before the Judge, or that she is guilty of it, and therefore I can only find that she is guilty either of the offence charged in the first head of the charge or of the offence specified in the second head of the charge, namely, that she intentionally gave false evidence before the Judge, or that she intentionally gave false evidence

"before the Magistrate." The effect of that finding is that the prisoner is liable to be punished for the offence for which the lowest punishment is provided if the same punishment is not provided for both (*see* Penal Code, Section 72). Vol. VI.

In the particular case referred to us, giving false evidence intending to cause a person to be convicted of culpable homicide not amounting to murder, such as the evidence given before the Magistrate, would be punishable more severely than giving false evidence to procure his acquittal. The former would fall under Section 194 of the Penal Code, and the latter under Section 193; the maximum punishment being for the former offence transportation for life or imprisonment for 10 years with fine, and for the latter offence imprisonment for 7 years with fine.

The argument of Mr. Justice Campbell would lead to the conclusion that no indictment ought to lie for giving false evidence before a Judge if it contradicts evidence previously given in the case before a Magistrate, inasmuch as the liability to be indicted if the evidence given before the Judge differs from that given before the Magistrate would be an inducement to the witness to stick to the first statement.

Kemp, J. I entirely concur in the judgment of the learned Chief Justice.

Ston-Karr, J. I entirely concur with the learned Chief Justice. Indeed, I had always understood that our Court and the subordinate Courts acted on the principle laid down in the judgment with which I concur, and until this reference was made, I was not aware that there existed any very serious doubts on the point. Indeed, unless Courts did and could return an alternative finding in such cases of false evidence, the most disastrous consequences to the administration of justice would ensue. Violent crime and crime of all kinds would go unpunished, and the witnesses who had been bought off to deny their statements implicating the perpetrators of such violent or other crimes would go unpunished also. I can conceive nothing more detrimental to society.

On the second point referred to us, I regret that I cannot concur with Mr. Justice Campbell if I understand him aright. I think that the examination of the prisoner before the Judge and the statement of the prisoner before the Magistrate are admissible for the reasons given by the Chief Justice, and are admissible to test the prisoner's guilt or innocence.

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The 5th September 1866.

*Present :*The Hon'ble F. B. Kemp and W. Markby,
Judges.• **Jurisdiction—Quashing of illegal conviction.**

Criminal Jurisdiction.

Convicted by the Assistant Commissioner of Palamow, under Sections 379 and 429 of the Penal Code, of theft and mischief, and punished separately for each offence; and referred by the Judicial Commissioner of Chota Nagpore under Section 434, Act XXV. of 1861, and Circular Order dated 15th July 1863.

Gunowree Bhooea and Jhandoo.

A Lower Court has no power to quash its own conviction, though illegal.

We concur in the opinion expressed by the Judicial Commissioner that the second conviction under Section 429 was improper, and we order it to be quashed accordingly.

The Court of first instance had no power to quash its own conviction though illegal.

The 5th September 1866.

*Present :*The Hon'ble F. B. Kemp and W. Markby,
*Judges.***Jurisdiction—Commitment—House Trespass**

Pakhee Sing and Bojnauth Sing.

Reference by Mr. Ainslie, Sessions Judge of Patna.

Where a charge was preferred before a Deputy Magistrate against certain persons, of having come armed with swords and with a large retinue and torches, and of having entered the complainant's house by night and carried off thence a large amount of property, the Deputy Magistrate on the evidence convicted the parties of house-trespass under Section 443 of the Penal Code. The Sessions Judge thought that the offences charged, if proved, amounted to house-breaking by night or to some other offence within the jurisdiction of the Court of Session, and asked whether he could direct a commitment.

HEIN that the Deputy Magistrate had neither convicted nor discharged any person of an offence not triable by him, that he had jurisdiction to try the offence charged, and that the sentence passed was within his competency.

Case. I have the honor to request instructions for my guidance in the following case.

A charge is preferred before a Sub-division Magistrate against certain persons (annel-

lants in this Court) of having come armed with swords, and with a large retinue and torches, and of having entered the complainant's house by night, and of having carried off thence a large amount of property.

These offences, if proved clearly, amount to house-breaking by night, or house-trespass by night after having made preparation to cause hurt, and to commit dacoity.

The Deputy Magistrate, on the evidence, convicts of *house-trespass* under Section 448, Penal Code. This offence certainly formed a part of the offence charged, and it is an offence within the jurisdiction of the Magistrate. The provisions of Section 427, Criminal Procedure Code, therefore, do not apply to this case.

The conviction, so far as it goes, is warranted by the evidence, but the evidence goes much further, and the question is, whether it should not have been on a higher charge, and, as such higher charge is one within the jurisdiction of the Court of Session, whether I can direct a commitment.

Before directing a commitment, it is clear that I must annul the sentence of the Lower Court; otherwise there would be the probability of conflicting decisions by the Jury on one side and the Magistrate and myself on the other; but, looking to Sections 55 and 427 of the Criminal Procedure Code, I am in doubt whether I can do so. The fact of there being a proviso in Section 55 in the special case of culpable homicide for enabling a Court to try a man a second time on the same facts for a new offence, and particularly of that power being limited to cases in which the Court had, at the time of conviction of a minor offence, no knowledge that death had resulted therefrom, appears to me to indicate that, if in other cases a Court convicts of a lesser offence than the proved facts disclose, such offence being one in respect of which it has jurisdiction, there can be no second trial on those same facts, more particularly when the Court had knowledge of the nature of the offences actually committed.

Moreover, this Court cannot, under Section 419, enhance punishment on an appeal. To direct a commitment would be to act with a view to enhancing punishment; otherwise it would be mere waste of time, as I am satisfied with the conviction so far as it goes.

On the other hand, if the Sessions Court cannot direct the sentence to be set aside and the commitment to be made, any Magistrate may practically prevent the Sessions Court from acting under Section 435. Such would be the result in the case out of which this reference arises.

The questions to which I have to ask the Court to reply are :—

1st.—If, having before him evidence which in the opinion of the Judge discloses an offence triable before a Jury in the Court of Session, a Magistrate should convict the accused of an offence of lesser degree and within his own power to dispose of, and should reject as untrustworthy, or otherwise pay no attention to the evidence in the higher Court, can the Judge, under Section 427, set aside the conviction, and, under Section 435, direct a commitment?

2nd.—Or, without setting aside the conviction, can the Judge order a commitment for the major offence, and proceed to try the prisoners again thereon? If so, should not this power be sparingly used in extreme cases only, so as to avoid danger of conflicting decisions on the same evidence?

3rd.—Is the fact of the matter having come up on appeal against the conviction by the Deputy Magistrate a bar to further proceedings against the appellants?

I am induced to make this reference, as this is the second case of the same kind that has come before me from the Deputy Magistrate of Behar. In the former I declined to act under Section 435, contenting myself with expressing an opinion that in such cases a Magistrate would do well to send the accused before a Court competent to deal with the whole of the offences disclosed. As such cases may be of frequent occurrence, I think the point should be settled that, if I have the power to interfere, I may exercise it when necessary; and, if not, that it may be noted, with a view to future amendment of the Criminal Procedure Code.

I do not send up the vernacular record, as the question is a general one, and is in no way affected by the particular facts of the case, out of which this reference arises.

Judgment of the High Court. Upon referring to the proceedings of the Deputy Magistrate, we find that he has not convicted any person of an offence not triable by him, nor has he discharged any accused person in any case of an offence not so triable. The provisions of Sections 427 and 435 of the Code of Criminal Procedure do not apply to the case before us. The Deputy Magistrate had jurisdiction to try the offence, and the sentence passed was within his competency. We, therefore, as far as the present case is concerned, answer the questions put to us in the negative.

The 5th September 1866.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Security to keep the peace (Term of).

Queen *versus* W. Don Dolloi.

Committed by the Assistant Commissioner, and tried by the Deputy Commissioner of the Cossyah and Jynteah Hills, on a charge of abusive language.

The period for which a prisoner can be bound down on security to keep the peace is one year from the date of his release from imprisonment.

We see no reason to interfere with the sentence passed. It certainly appears to be *prima facie* severe, but as it has been upheld by the Lower Appellate Court, which is necessarily better acquainted with the facts of the case and character of the prisoner than we can pretend to be, we do not think it right to disturb it.

The period for which the prisoner can be bound down on security to keep the peace is one year from the date the prisoner is released from jail. The order of the Lower Court is amended to this extent.

The 8th September 1866.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Public Nuisances.

Criminal Jurisdiction.

Referred under Section 434 of the Code of Criminal Procedure, and Circular Order No. 18, dated 15th July 1863.

Joynath Mundul and others

versus

Jamul Sheikh and another.

The omission of a person to keep his ponies from straying is not a public nuisance punishable under Section 290 of the Penal Code.

It is clear that there was no offence committed punishable under Section 290 which relates to public nuisances. Public nuisances

Jol. VI. are defined by Section 268 as any "act or illegal omission which causes any *common* injury, danger, or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which *must* necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any *public right*." But the omission of the accused to keep his ponies from straying, though illegal, was not proved to have caused any common injury, danger, or annoyance whatever; nor did it necessarily cause any injury, &c., to persons, having occasion to use any public right, within the meaning of the second branch of the Section. The only person injured was the Collector, who must resort to a civil action for the wrong (if any) which he has suffered.

The conviction must therefore be quashed, and the fine, if paid, must be returned to the defendant.

The 8th September 1866.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Trial by Jury—Charge of Judge.

Queen versus Bolakee Koormee.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of

It is the duty of a Judge to state to the Jury what are the principal points in the evidence, and how they bear for or against the prisoner. In short, to render the Jury every assistance in his power towards coming to a right conclusion.

We think that the case has not been satisfactorily laid before the Jury. By Section 379 of the Indian Code of Criminal Procedure the Judge is required to sum up the evidence on both sides, and, in doing this, it is the duty of the Judge to state to the Jury what are the principal points in the evidence, and how they bear for and against the prisoner. We gather that in this case the prisoner had, at some time or other, set up the defence that the dāk bearers had got frightened, and thought that he intended to attack them, when really he was innocent of any such intention. This defence appears to us by no means an improbable one and not inconsistent with the facts of the case, and it ought to have been laid before the Jury for their serious consideration. The evidence for the prosecution also ought to have been analysed and explain-

ed. In short, it is the duty of the Judge to render the Jury every assistance in his power towards coming to a right conclusion. In this case the Judge really delivered to the Jury no charge at all: and altogether the trial appears to have been conducted in rather a hasty manner.

The case is therefore sent back for re-trial, the present conviction being quashed.

The 16th September 1866.

Present :

The Hon'ble G. Loch and J. P. Norman,
Judges.

Evidence—Statement of Police-officer as to prisoner's previous bad character.

Queen versus Gopal Thakoor.

Committed by the Deputy Magistrate of Bancoorah, and tried by the Sessions Judge of West Burdwan, on a charge of dacoity.

Remarks on the improper admission, at a Sessions trial with the aid of Assessors, of a Chowkeedar's statement as to the previous bad character of the accused.

THE prisoner has been convicted by the Sessions Judge of West Burdwan, concurring with the Assessors, of dacoity, and sentenced to imprisonment for ten years.

It appears that some carts containing indigo seed were being driven along the road from Raneegunge to Bancoorah, when 10 or 12 men came out of the jungle, and stopped the hindmost cart. Five bags of the seed were carried off into the jungle, where they were found cut, with some of the indigo-seed strewn on the ground. The carters told the police they could recognize two men, and they did recognize two men, one of whom was the prisoner, out of five whom the police brought before them.

Looking at the state of distress for want of food which prevails in the district; considering that the object of the offenders was evidently only to get food; that the whole of the property has been recovered, the dacoits having left the bags on the ground when they found that they did not contain rice or other edible grain; and that no violence of any sort was used, we think that the sentence is rather severe, and we reduce it to two years' rigorous imprisonment.

We must observe that a chowkeedar was most improperly permitted by the Sessions Judge to state at the trial that the prisoner had been imprisoned for seven years in a previous dacoity case, and that the neighbours were afraid of him. As a matter of fact, the evidence against the prisoner was very slight, consisting of little more than his identification by two of the carters who had never seen him before that night, and that evidence was not tested by any examination of details—as, for instance, by seeing whether the witnesses had given any description of the persons of the offenders before the prisoner was actually arrested.

The Assessor, Baboo Doorga Pershad Patuck, at once relieves himself of any doubt or responsibility by seizing upon the chowkeedar's statement. He says the prisoner is a very bad character who has undergone seven years' imprisonment already.

We have no doubt but that the prisoner has been prejudiced by the improper admission of this evidence. If he had put forward any substantial defence, we should have doubted whether the conviction ought to stand. But, on the whole case, we see no reason to think that the conclusion as to his guilt is not correct.

The 15th September 1866.

Present:

The Hon'ble G. Loch, *Judge*.

Conviction Confession—Corroboration.

Queen versus Runjeet Sontal.

Committed by the Deputy Magistrate, and tried by the Officiating Sessions Judge of Midnapore, on a charge of dacoity.

A prisoner may be convicted on his own uncorroborated confession.

THE conviction of the prisoner Runjeet is correct, and his appeal has been dismissed.

It is necessary to point out to the Officiating Sessions Judge that he has committed an error in law in releasing the other prisoners on the ground that there was no other evidence to corroborate their confessions. The prisoner Runjeet was knocked down and

secured while carrying off the plunder. He confessed to the Deputy Magistrate, and mentioned the names of his companions who were apprehended and confessed. Neither the Sessions Judge nor the Assessors question the truth of their confessions, but because there is no corroborative evidence, such as recognition, or property found in their possession, the prisoners have been pronounced to be *not guilty*.

By Section 366 of the Code of Criminal Procedure "the examination of an accused person before the Magistrate shall be given in evidence at the trial;" and if there are no grounds for questioning the statement then made, either as regards the manner of recording it, or as to the facts stated in it, the prisoner can be convicted on that statement without other corroborative evidence.

The 18th September 1866.

Present:

The Hon'ble J. P. Norman, *Judge*.

Fugitive Offender—Proclamation—Forfeiture of property

Criminal Jurisdiction

Referred under Section 434, Act XXI. of 1861, and Circular Order, dated 15th July 1863, No. 18.

Shewdial Sing

versus

Grihan Sing.

Before the passing of an order declaring the property of an accused person, who cannot be found, to be at the disposal of the Government, there must be a proclamation under Section 187, Code of Criminal Procedure, specifying a time within which such person is required to appear. But, before a Magistrate can issue such a proclamation, he must be satisfied that such person has absconded or is concealing himself for the purpose of avoiding the service of the warrant.

This is a case sent up by the Sessions Judge of Bhaugulpore under Section 434.

It appears that, on the 1st of June 1864, a warrant was issued for the arrest of Shewdial.

I may observe that the warrant does not state the offence with which the accused was charged, as required by Section 76 and Form B, Appendix, Code of Criminal Procedure.

On the 11th of June, the Sub-Inspector of the Soornjgurh Station made a return that constables Asgur Ali and Bunsee Sing had

ol. VI. been deputed to execute it; that they had made great search and tried their utmost, but failed to find the defendant, who was concealing himself in some unknown place; and that he could not be traced.

On the 14th of June 1864, that Magistrate made an order that, "as, in reference to the return of the warrant by the Sub-Inspector, it appears that he *could not find Shewdyal* who had been ordered to appear, it was, therefore, ordered that the property should be attached, and that notice be issued under Act XXV. of 1861.

Before the Magistrate can issue the written proclamation under Section 183, and order the attachment of the property of an accused party who cannot be found, he must be *satisfied that such person is absconding or concealing himself for the purpose of avoiding the service of the warrant.*

The Magistrate should have recorded in his proceedings whether or not he was so satisfied. The mere fact which he does record, *viz.*, that the Sub-Inspector *could not find* Shewdyal, is not enough under these Sections.

It seems wholly uncertain whether any written proclamation under Section 183, requiring Shewdyal to appear within a fixed period, ever did issue from the Magistrate's Court. There appears to be no copy of any such proclamation in the proceedings. It is only by a mere conjecture that we could infer that this proclamation is what the Magistrate alludes to in his order of the 14th of June as "a notice under Act XXV. of 1861." If any such proclamation ever issued, there is, as the Judge says, nothing to shew that it was publicly read or stuck up as required by Section 183. The Joint Magistrate says, "The Nazir's return cannot be found." The entire absence of all allusion to any proclamation in the subsequent proceeding leads to the inference that none was in fact issued.

It is admitted by the Joint Magistrate that no order has been passed declaring the property to be at the disposal of the Government. Now, if there was no proclamation under Section 183, no such order could have been or can now be made. Even if any proclamation was in fact issued, there is nothing in the papers on the record to show what was the time specified as that within which Shewdyal was ordered to appear: and consequently, even if it be attempted to support the order for sale, as an irregular and informal order placing the property at the disposal of Government, as suggested in a remark by the Joint Magistrate, the Joint

Magistrate had apparently no evidence before him on which he could have found that Shewdyal did not come in within the time limited by the proclamation.

As the rights of the Government and the purchaser will be affected by an order setting aside the sale, the sale ought not to be set aside without giving them an opportunity of being heard.

It is therefore ordered that the Government and the purchaser be at liberty to show cause on Friday, the 28th of September, why the order of the Joint Magistrate for the sale should not be repaid to the purchaser. Notice will be served on the Government Pleader, the Collector of Bhaugulpore, and on the purchasers Brijolal Singh and Ramdyal Singh, and their Mooktear Oojenall.

The 24th September 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell,
Judges :

Disputes concerning use of water—Section 320, Code of Criminal Procedure (Construction of).

Criminal Jurisdiction.

Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated 15th July 1863.

Moonshee Hurukh Lall.

Section 320, Code of Criminal Procedure, is not intended to provide a substitute for a civil suit to declare the rights of the parties, but only empowers the Magistrate to order that possession shall not be taken by any party to the exclusion of the public, until the party claiming possession obtain a decree for exclusive possession.

It is quite clear that the order of the Magistrate is erroneous, and must be quashed. When it appears that the use of water is open to the public or to any person or class of persons, the Magistrate, under Section 320, may order that possession shall not be taken by any party to the exclusion of the public or such persons until the party claiming possession obtain a decree adjudging to him such exclusive possession. Here the complainant was not in possession. She was simply a zemindar who had let her lands in farm. If the farmer and the ryots who actually used the water had complained, the case might have been different. The Section in question is not intended to provide a substitute for a civil suit to declare the rights of the parties.

The 24th September 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell,
Judges.

**Trial before Magistrate—Procedure on denial
of complaint by accused.**

Criminal Jurisdiction.

*Referred under Section 434 of the Code of
Criminal Procedure, and Circular Order
No. 18, dated 15th July 1863.*

Ahlad Monce Dossee.

When an accused person denies the truth of the complaint made against him, the Magistrate ought, under Section 266, Code of Criminal Procedure, to hear the complainant and his witnesses in support of the complainant, and also the accused and his witnesses.

THE proceedings of the Joint Magistrate in this case are utterly illegal. The Road Inspector of Bauleah reported certain persons for allowing their tanks to be in a filthy state. Gumany Chuprassy appeared in support of the complaint on the 28th of June of the present year, and stated that in Gurrukparah *Lall Bahari Baboo's two tanks were* in a very filthy state.

On this a summons issued directed to Ahlad Monce, the wife of Lall Bahari.

On the 13th of July Radha Soonder Raie, Mooktear Agent for Ahlad Monce, appeared and made defence, stating that she had *one* ditch in Gurrukparah, that it was clean, that it was cleaned two months ago, that she was fined 3 rupees, for not cleaning it before, by the Deputy Magistrate, and that she had no other tank in Gurrukparah.

On this it was the Magistrate's place duly to hear the complainant and his witnesses in support of his complaint, and also hear the accused and her witnesses under Section 266, Code of Criminal Procedure.

But, without hearing any witness at all, without even having given to the accused any opportunity of cross-examining or contradicting Gumany, who had been examined in her absence, he writes : " Defendant No. 4 (that is, Ahlad Monce) not being present this day, I fine her *32 Rupees, being 16 Rupees on account of each tank.*"

The Sessions Judge suggests that the accused could not be convicted under Section 269 of the Penal Code. In this he is probably right. But we are disposed to

think that, if the offence was proved, she **Vol. VI.** might have been fined under Section 290 (see Section 32). The conviction must be quashed, and the fine repaid.

The 26th September 1866.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Evidence—Dying declarations—Rape.

Queen *770* *versus* Bissonumjun Mookerjee.

*Revised under Section 405, Code of Criminal
Procedure.*

The dying declaration of a deceased person is admissible in evidence on a charge of rape.

THE question put to us in this case relates to the admissibility of the dying declaration of a deceased person.

The prisoner was indicted on a charge of murder and rape. The general evidence against the prisoner was that he enticed the deceased girl into his house, from which she returned shortly afterwards, having suffered such great violence to her person that she died shortly afterwards.

The Sessions Judge was of opinion that the deceased made the statement in question under the apprehension of impending death. The effect of the statement was that the prisoner was the person who committed the outrage.

The Sessions Judge told the Jury that the evidence was admissible on the charge of murder, but that, on the charge of rape, it was not so ; and that, when considering this charge, they were to attach no weight to this evidence.

The prisoner was acquitted of murder, and convicted of rape ; and as, with respect to this offence, the evidence was rejected, the conviction is in no way invalidated if the Sessions Judge was, in our opinion, wrong in his direction. But, as the question has been put to us, we are willing to state our opinion on the point.

We admit that the Sessions Judge's ruling is in perfect accordance with the English law of evidence as applicable to criminal cases, the admissibility of dying declara-

Vol. VI. tions being there confined to cases of homicide, where the death of the party making the declaration is the subject of enquiry; but, for the reasons we are about to state, we do not consider so narrow a rule to exist in this country, nor because of any difference between Europeans and Orientals, but because we do not consider that the English rule rests on any sound principles.

For the reasons stated by the Chief Justice in the judgment of the Full Bench in *Reg. vs. Kyroollah*, Weekly Reporter, Criminal Rulings, Vol. VI., page 21, we feel ourselves at liberty to examine any rule of evidence applicable to criminal cases for which English authority alone is quoted, and which has not been established here by Legislative enactment, or by the long practice of the Courts recognized by the superior Courts of Appeal.

The only Legislative enactment upon the subject in this country is the provision contained in Section 29 of Act II. of 1855, which provides that, where dying declarations are evidence, they shall be received, if it be proved that the deceased was at the time of making the declaration, and then thought himself to be, in danger of impending death, though he entertained, at the time of making it, hope of recovery. This provision, though it modifies the English law on this point in an important particular, does not affect the present question.

It seems pretty certain that the law in England on this subject has been much narrowed of late years. There are instances in the older books in which dying declarations have been admitted in civil cases, and in no case earlier than *Rex vs. Hutchinson*, in 1822 (*see* vol. 2, page 608), does the rule appear to have been laid down that dying declarations are only admissible where the death of the declarant is the subject of enquiry. The existence of this rule of exclusion is asserted in *R. vs. Mead*, page 608; but Mr. Justice Coltman and Mr. Baron Parke, in *R. vs. Baker, Moody and Robinsons' Reports*, vol. 2, page 53, did not act upon it. In *R. vs. Hind*, 29 Law Journal, Magistrates' Cases, 148, the rule, as laid down in *R. vs. Mead*, was again enunciated and acted on. Neither in *R. vs. Mead* nor in *R. vs. Hind* is a single argument given or authority quoted in support of the rule.

It cannot, therefore, be said that the authority of English decisions is very strong in support of the exclusion.

With regard to the English treatises, Best, Phillips, and Taylor, all recognise the exclusion of the evidence in such cases; they all treat the admissibility of dying declarations as itself exceptional, and place this limitation on the exception, that the declaration must relate to the death of the person making the declaration, and is only evidence when that is the subject of enquiry; but there is little force in their reasoning.

Our reason for thinking that this evidence ought to have been admitted is that no possible reason can be given for its admission in the case where the death of the party making the statement is the subject of the enquiry, which does not apply with equal force to its admissibility in the present case. The ground on which dying declarations are admissible is that, when they are made, the declarant is in a condition in which, according to the experience of mankind, it is not less likely that what he says is true than if it had been said before a Magistrate under the sanction of an oath and in presence of the prisoner. It is, therefore, put on a level with a *deposition*, technically so called, which is admissible in case of the deponent's death or absence from illness. But this has nothing to do with the nature of the crime to which the evidence relates; it is just as applicable to one crime as another.

It has been said that Courts have been driven to accept this evidence by the necessity of the case: the necessity arising from this, that the injured person, who might be the principal witness against the prisoner, is dead. We may remark that such necessity, as it is called, is not a ground for receiving evidence which ought, on other grounds, to be excluded, nor is it the reason why this evidence is admitted; but, even if it were so, that necessity is just as likely to exist where the deceased person has been robbed, or raped, or assaulted, as where he has been murdered.

Considering, therefore, as we do, that dying declarations are a species of evidence, which, on the whole, are likely to be useful in leading Juries and Courts of Law to a right conclusion on the facts before them, and that the principle on which they are admissible in cases of murder is applicable to their admissibility in other cases, we think that the Sessions Judge was wrong in his direction to the Jury, and that the evidence in question was admissible on the charge of rape.

The 26th September 1866.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Evidence (of offenders).

Queen versus Reaz Ali alias Dulloo Khan.

Committed by the Joint Magistrate of Monghyr, and tried by the Sessions Judge of Bhagulpore, on a charge of dacoity.

The evidence of persons who are themselves liable to punishment should be carefully sifted and tested before they can be relied on in a Court of Law.

In this case we are not satisfied with the evidence on which the prisoner has been convicted. No one can doubt that the testimony of persons in the position of witnesses Nos. 2, 3, and 7, however useful it may be in assisting the detection of crime, requires to be very carefully sifted, before reliance can be placed on it in a Court of Law. There always will exist in the minds of persons, who are themselves liable to punishment, a notion that they will obtain benefit by procuring the conviction of others. In the present case the evidence of these witnesses appears to have been in no way tested, and the only circumstance which is mentioned as confirming the truth of their statements is that the prisoner's name was mentioned on a former occasion as one of the dacoits. But this circumstance is, we think, too slight to add such weight to the evidence of the informers. It does not appear that it was by these persons that the name was mentioned, and no steps appear to have been taken upon the information.

It is true that the witnesses 1, 4, and 5, profess to identify the prisoner as one of the dacoits, but we cannot attach any importance to their statements. The dacoity occurred four or five years ago, and none of these persons had ever seen the prisoner before or since. Identification under such circumstances, except in very rare cases, appears to us to be quite out of the question.

We regret that the Sessions Judge has not furnished us at greater length with his reasons for convicting the prisoner, without which it is extremely difficult for a Court of Appeal to come to a conclusion on evidence not taken before them. But on the whole we feel bound to say that a conviction

on this evidence cannot be supported. **Vol. VI.**
We, therefore, order it to be quashed, and the prisoner to be acquitted and released.

The 27th September 1866.

Present :

The Hon'ble W. Markby, *Judge.*

License (for carrying on Slaughter-house under Act VII. of 1865, B. C.)—Notice of revocation.

Petition of Mr. E. Vere Haldane, Vice-Chairman of the Municipal Commissioners for the Suburbs of Calcutta.

The length of notice to be given to persons holding licenses for carrying on slaughter-houses under Act VII. of 1865, B. C., must be determined in each case according to its own particular circumstances.

THAT a license was granted on the 24th June 1865 to Rohametoollah to use a place for a slaughter-house within the Suburban Municipality, and was to last until further orders. That, with a view to register all licenses and to make temporary ones permanent, and for other municipal purposes, a notice was issued on the 9th July 1866 on Rohametoollah, informing him that it was necessary for him to take out a fresh license within seven days, on failure of which the temporary license he already held should be considered forfeited. That, by a letter signed by Messrs. Dignam and Carruthers, his attorneys, Rohametoollah declined to attend to this requisition, and went on slaughtering without a fresh license, although the old one was no more in existence. That Golam Hossein, who alleged himself to be a servant of Rohametoollah, was, on a personal inspection made by the Vice-Chairman, found to have been continuing the slaughter-house without a license, and he was accordingly charged under Section 1, Act VII. of 1865, B. C., with having a place as a slaughter-house without a license. The sitting Commissioner convicted him on the 31st August last, and fined him Rs. 200.

“The defendant, Golam Hossein, being dissatisfied with this order, appealed to the Sessions Judge of the 24-Pergunnahs, who, on the 8th instant, overruled the conviction, and remitted the fine, on the ground, as stated in his judgment, that the seven days’

Vol. VI. notice was not sufficient, and therefore the withdrawal of the license and the infliction of the fine were not justifiable.

"Your petitioner is not aware as to the extent of relief he can expect from your Lordship's hands in connection with the question of fine which has been remitted in this case by the Sessions Judge; but he has no doubt that, under Sections 404 and 405 of the Code of Criminal Procedure, this Honorable Court possesses full powers to correct any mistake committed by any subordinate Court on a point of law; your Lordships will, therefore, be pleased to settle authoritatively as to whether the Sessions Judge was legally correct in saying that the words 'until further orders' entitled any person to supply a time or a license with such words subjected to be cancelled at any time after the holder of it was duly warned.

"When Rohametoollah refused through his attorney to take out a fresh license, and relied entirely on his former one, which was void, it cannot be said that the old license was sufficient to protect him or his servants from the punishment which the law inflicts, for carrying on a slaughter-house without a license. Your petitioner, therefore, craves that your Lordship will be pleased to set aside the opinion expressed by the Sessions Judge, and your petitioner, as in duty bound, shall ever pray."

Judgment of the High Court. - I do not think it necessary to send for the record in this case, because I think there is nothing in Mr. Beaufort's decision upon which any restriction upon the jurisdiction of the Commissioners can be founded. The right of the Commissioners, to revoke licenses granted "until further orders," is clearly recognised, as well as their right to proceed against persons holding such licenses, and who carry on their slaughter-houses after the licenses have been revoked. The remarks of Mr. Beaufort as to the length of notice which ought to be given to the person holding such a license before it is revoked, I consider to apply only to the particular case before him. All that the Commissioners are bound to do is to give a reasonable notice to the party who holds the license, in order that he may apply to renew it, or make other arrangements for carrying on his business. There is no general rule applicable to all cases as to when notice ought to be given, which will have to be determined in every case as it arises, according to its own particular circumstances.

The 27th September 1866.

Present:

The Hon'ble William Markby, *Judge*.

Forgery.

Queen versus Gyanee Ram.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of fraudulent execution in signing a document, &c.

The signing of a vakalutnamah in the name of co-decree-holders without their authority to do so, and delivering it to a vakeel with instructions to file a petition stating that the debt had been satisfied, and praying that the case may be struck off the file, is forgery within the meaning of Section 463 of the Penal Code.

THE prisoner in this case has been convicted of the offence of forgery under Section 463 of the Indian Penal Code. The case, which was very clearly proved, was that the prisoner, being one of several joint-decree-holders, made a collusive arrangement with the judgment-debtor that a certain sum of money should be paid to himself in satisfaction of the decree, and that he should stop proceedings upon the decree. Upon this the prisoner signed a vakalutnamah in the name of Golab Ram and others, his fellow decree-holders, and delivered it to a vakeel with instructions to file a petition stating that the debt had been satisfied, and praying that the case might be struck off the file, which was accordingly done. Subsequently a petition was filed by Golab Ram, denying that the prisoner had any right to use his name; and the Judge, being satisfied that this was so, directed these proceedings to be taken against the prisoner.

The vakalutnamah was signed in this form: "Golab Ram by the pen (bukalam) of Gyanee Ram (the prisoner)."

The only question is, whether this is a forgery within the meaning of Section 463 above referred to? and I think that it is. Section 463 declares the making a false document with intent to commit fraud to be forgery, and Section 464 declares that a person who signs a document, with the intention of causing it to be believed that such document was signed by the authority of a person by whose authority he knows that it was not signed, makes a false document.

These words clearly include the present case.

I only reserved my decision in this case, because I wished to look at the case of *Regina versus White*, reported in Volume I. of Denison's Crown Cases, in which the Court of Criminal Appeal in England unanimously held that the unauthorized use of another person's name professedly as agent was not forgery. But I find that that case turned entirely on the English definition of forgery under the then existing Statutes, and has no effect whatever upon the interpretation of the Section of the Indian Penal Code now under consideration.

The appeal of the prisoner is, therefore, dismissed, and the conviction affirmed.

The 28th September 1866.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Theft.

Queen versus Nobin Chunder Haldar.

Criminal Appellate Jurisdiction.

Miscellaneous Case.

The prisoner, acting *bond fide* in the interest of his employers, and finding a party of fishermen poaching on his masters' fisheries, took charge of the nets, and retained possession of them, pending the orders of his employers.

Held that the prisoner was not guilty of theft.

On the 21st instant we issued an order for the immediate release of this prisoner. We now proceed to give our reasons for such order.

This appeal was submitted on a point of law, and was referred to this Bench by the Judge sitting in the Miscellaneous Department.

The prisoner was convicted of theft, Section 379 of the Indian Penal Code, and was sentenced to simple imprisonment for the period of one month, and a fine of Rs. 20, in default of payment further imprisonment for one week.

It appears that a party of fishermen were poaching on the fisheries belonging to the Port Canning Company, their nets were

seized, and the prisoner, who is a servant in the employ of that Company, took charge of the nets, and refused to give them up to the Police, without the orders of his immediate employers. The gist of the offence of theft consists in the dishonest intention of the party taking the property. In the present case it is very clear that there was no dishonest intention. The prisoner, acting *bond fide* in the interest of his employers, and finding the fishermen poaching on his masters' fisheries, took charge of the nets, and retained possession of them, pending the orders of his employers. The taking not being criminal when the possession was charged, there was no theft, and the conviction is illegal, and must be quashed.

The 29th September 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell,
Judges.

Abscinded Offender—Forfeiture of property of.

Criminal Jurisdiction.

Sheodoyal Singh versus Girban Sing.

Referred under Section 434, Code of Criminal Procedure.

Procedure by Magistrate before declaring a forfeiture of the property of an absconded offender.

In this case it is quite clear that there is nothing to show that the steps which are necessary to entitle the Magistrate to declare the property at the disposal of the Government, under Section 184 of the Code of Criminal Procedure, were ever taken, and, in fact, no such confiscation ever took place. When the defendant came in, he was not asked whether he had really absconded and concealed : and, as his property was not confiscated, he did not tender any explanation to the Judge, and, in fact, he was not called upon to do so under Section 185. The proceedings are irregular, and must be quashed, the property to be restored to Sheodoyal, and the purchaser will get back his purchase-money.

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The 3rd October 1866.

Present :

The Hon'ble F. B. Kemp and Shumbhoonath Pundit, *Judges.*

Breach of contract (to convey Indigo from the field to the vats)—Section 490, Penal Code.

Criminal Jurisdiction.

Referred under Section 490 of the Civil Procedure Code.

Nowa Tewaree and Mullen Jha.

An agreement for personal service in conveying indigo from the field to the vats is not a contract, the breach of which is punishable by Section 490 of the Penal Code.

Remarks by the Assistant Magistrate.

An agreement for personal service in conveying indigo from the field to the vats is not a contract, the breach of which is, and was, intended to be made punishable by Section 490 of the Penal Code. The words "voyage or journey" apply to, and must be read with, the whole of the Section; and indigo, on its way from the fields to the vats, can scarcely be said to be either on "voyage" or "journey." It is true these words do not occur in Illustration (C), but they are necessarily implied. The illustrations "make nothing law which would not be law without them." "They are not intended to supply any omission in the written law, or to put a strain on it." Besides, it seems clear from the remarks of the Indian Law Commissioners that this Section was enacted to protect travellers, and the goods of travellers, against the rascality of a class of men who would be able to render them no adequate compensation for a serious wrong, and whose "whole property would probably not cover the expenses of prosecuting them civilly," and not to apply to contracts like the contract in this case, where, whatever may be the inconvenience and delay in prosecuting the offenders civilly, damages can generally be recovered. Again, the description of the property to be conveyed is not sufficiently explicit. The goods must be most clearly specified.

Remarks by the Magistrate.—In the few instances which have come before me of such cases as this, I have always refused to take them up in the Criminal Court, believing that the Section of the Penal Code is not applicable. I therefore agree with the

Assistant Magistrate; but, as it appears that cases similar to this have been allowed by some Magistrates in this district, and convictions sustained under this Section, it is advisable, I think, in this diversity of opinion, to have an authoritative ruling.

Judgment of the High Court.—Read the proceedings connected with this reference. The Court are of opinion that Section 490 of the Indian Penal Code is not applicable to the case submitted to their consideration, and they agree in the remarks recorded by the Assistant Magistrate and Magistrate of Sarun.

The 4th October 1866.

Present :

The Hon'ble G. Loch and Shumbhoonath Pundit, *Judges.*

Abetment of murder—Disappearance of evidence of a crime.

Queen versus Goburdhun Bera.

Committed by the Deputy Magistrate, and tried by the Officiating Sessions Judge of Midnapore, on a charge of murder.

Prisoner was present at a murder without being aware that such an act was to be committed. Through fear he not only did not interfere to prevent the commission of the crime, but joined the murderers in concealing the body. HELD that he was guilty, not of abetment of murder, but of causing the disappearance of evidence of a crime under Section 201 of the Penal Code.

Loch, J.—I THINK that the finding of the Sessions Judge is opposed to the evidence, and that the prisoner cannot be convicted of abetment. The prisoner was present when the murder took place. He was not aware that such an act was to be committed, but he did not interfere to prevent the commission of the crime, being apparently too much frightened to do so. He joined the murderers in concealing the body, being frightened into compliance by their threats. This is the substance of the evidence given by Bhurut Gorayen, the only eye-witness. The substance of the prisoner's verbal confession to the Deputy Magistrate, as deposed to by that officer and the Deputy Inspector of Police, is to the same effect; and, from this evidence, it cannot be said that the murder was committed in consequence of this prisoner's abetment. The prisoner appears to me guilty of an offence under Section 201, and liable under that Section to imprisonment, and I would sentence him to five years' rigorous imprisonment.

Shumbhoonath Pundit, J.—I concur.

The 5th October 1866.

Present:

The Hon'ble F. B. Kemp, *Judge*.

Evidence—Confession of prisoner.

Queen versus Freemutty Mongola.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Midnapore.

The confession of a prisoner before a Magistrate, though retracted before the Judge, is admissible in evidence against the prisoner, provided the Judge be satisfied that it was voluntarily made.

I CANNOT interfere with the sentence in this case, though, I think, the prisoner ought to have been convicted of the graver charge.

The Sessions Judge is clearly wrong in stating that the confession of the prisoner, Mongola, before the Deputy Magistrate, is not evidence against her, simply because she retracted it in his Court. In almost every case, the confession before the Magistrate is retracted before the Sessions Judge. It is, however, admissible as evidence, provided the Sessions Judge be satisfied that it was voluntarily made. The Court cannot but express their surprise that the Sessions Judge should entertain such an erroneous opinion.

Appeal rejected.

The 5th October 1866.

Present:

The Hon'ble F. B. Kemp and W. Markby,
Judges.

False evidence—Criminal Prosecution under Registration Act XX. of 1866.

Queen versus Juggut Chunder Dutt.

Criminal Referred Jurisdiction.

A Sub-Registrar is competent, for any purpose contemplated by Act XX. of 1866, to examine any person; and any statement made by such person before an Officer

in any proceedings or enquiries under the Act, if intentionally false, renders such person liable to a criminal prosecution. **Vol. V.**

This is a reference made by the Sessions Judge of Jessore, moving this Court to express an opinion upon a point which has arisen in a case coming under the new Registration Act XX. of 1866.

It appears to us that Juggut Chunder Dutt, acting on behalf of Ram Dyal Ghose, presented a document to the Sub-Registrar of Narail, which purported to be a dur-mourosec pottah from Doorga Churn Bose, for the purpose of having it registered.

At the instance of Juggut Chunder, the alleged grantor of the lease, Doorga Churn Bose, was summoned. He appeared, and denied the execution of the deed. At this stage of the case, it appears to us that the Sub-Registrar, under Section 36 of the Act, would have done well had he simply recorded his reasons for refusing registry on the document, as directed in Section 82, leaving the investigation of the facts to the tribunals regularly constituted for that purpose. But he went further, and examined the grantor and the attesting witnesses, and, having apparently satisfied himself that the grantor had intentionally made a false statement in stating that he had not executed the deed, he instituted proceedings under Section 92 of the Act, having first obtained the sanction of his immediate superior under Section 95. These proceedings may have been indiscreet, but they are clearly not illegal. The Sub-Registrar was competent for any purpose contemplated by the Act to examine any person, and any statement made by such person before an officer in any proceedings or enquiries under the Act, if intentionally false, renders such person liable to a criminal prosecution. Copy of these remarks will be forwarded to the Judge.

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The 5th October 1866.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Murder (of supposed wizard).

Queen versus Ooram Sungra.

*Committed by the Assistant Commissioner,
and tried by the Judicial Commissioner of
Chota Nagpore, on a charge of murder.*

A sentence of death was commuted into one of transportation for life in the case of a prisoner who committed murder in the belief that the deceased was a wizard and the cause of his child's illness, and that, by killing the deceased, the child's life might be saved.

IN this case the prisoner has been convicted of murder. It appears that his child was dangerously ill, and that this ignorant man had been told by a person, calling himself a "Diviner," that the spirit of one Mitta was abroad, and that, until it was appeased, the child would not recover. The prisoner accordingly went to Mitta, and called upon him to take measures to appease his spirit. He at first refused, saying he had not the means; but, after being threatened by the prisoner, he sacrificed a sheep, a pig, and three fowls. As, however, the child did not get better, the prisoner, two days afterwards, went again to Mitta, abused him and his wife, accused them of witchcraft, and said openly that, if his child died, he would kill Mitta. On the next morning, Mitta was found dead in the prisoner's house with five severe wounds in the head, which were undoubtedly the cause of his death. The child was not then dead, but died two or three days afterwards.

These are the facts as stated by the Judicial Commissioner of Chota Nagpore, who tried the case, and, there being no direct evidence as to how the murder took place, he proceeds in his judgment to shew very clearly that the story told by the

prisoner and his wife as to how Mitta came by his death is untrue, and to give his reasons for coming to the conclusion that the prisoner murdered him.

The Assessors expressed their opinion that the prisoner killed the deceased in the belief that he was a wizard.

We adopt entirely the conclusions of the Court below, and we have no hesitation in saying that, both in fact and law, the prisoner is guilty of murder.

It remains to consider whether the sentence of death passed upon the prisoner by the Judicial Commissioner ought to be affirmed, or whether we ought to exercise the power which we possess of reducing the punishment to transportation for life.

We have hesitated a good deal upon this point. There can be no doubt that the murder was deliberate and intentional, and, in that view, merits the severest punishment which the law can inflict. On the other hand, the prisoner was undoubtedly acting under the influence of the belief that the deceased man was the cause of his child's illness, and, probably, thought that, by the act of killing Mitta, the child's life might be saved. Absurd and unfounded as that belief was, we think that we are bound to take it into consideration, and make some distinction between such a case as this and cases in which deliberate murder has been committed from baser motives. We, in no way, countenance the supposition that the existence of such a motive as existed here in any way changes the nature of the crime; but we think that, as the law has prescribed two different degrees of punishment for the crime of murder, this is a case which, under all the circumstances, may be considered not to merit the severer penalty.

We, therefore, affirm the conviction, but annul the sentence of death passed upon the prisoner, and, in lieu thereof, direct that he be transported for life.

The 21st September 1866.

Present :

The Hon'ble F. B. Kemp and W. Markby.
Judges.

Murder—Confession.

Criminal Referred Jurisdiction.

Queen *versus* Hyder Jolaha.

A person may be convicted of murder on his own confession.

Where a master accompanies a servant knowing the latter's intention to commit murder, and is present at the commission of the murder, although he struck no blow, still he is guilty as a principal, the only reasonable presumption being that both were acting with a common intent.

Markby, J. Is this case the prisoner Hyder has been convicted of murder on his own confession, which, there is no reason whatever to doubt, is a true one, and we affirm the conviction and sentence of death passed upon him.

We are at a loss to conceive why the prisoner Pritto was not convicted. He is the prisoner Hyder's master, and is, no doubt, greatly his superior in rank and intelligence. The weapon with which the woman was murdered was his, and he admits that he was present when the murder took place, having accompanied Hyder, of whose intention to commit murder he says he was aware. Even though it be true, as he alleges, that he struck no blow, still he was guilty as a principal, the only reasonable inference being that he and Hyder were acting with a common intent. We think the opinion of the Assessors was right, but the Code of Criminal Procedure gives no power to interfere where a prisoner has been acquitted.

The 20th October 1866.

Present :

The Hon'ble G. Loch and Markby, *Judges.*

Robbery—Separate trials—Irregularities.

Queen *versus* Itwaree Dome and others.

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of lurking house-trespass by night in order to commit theft, &c.

Where persons are committed on three separate and distinct charges for three separate and distinct robberies committed on the same night in three different houses, they must be tried separately on each of the three charges.

Remarks on the irregularities in the investigation of the present case.

Markby, J.—THE prisoners in this case were committed on three separate and distinct

charges, for three separate and distinct robberies committed on the same night in three different houses. The prisoners must be tried separately on each of three charges, and the present trial upon all three charges at once is illegal.

The verdict and sentence of the Sessions Judge are quashed as against all the prisoners, and a new trial is ordered.

We think it also necessary to call the attention of the Sessions Judge to one or two points in the case which seem to have escaped his attention.

The evidence against the prisoners consists entirely of the presumption which arises from stolen property having (as alleged) been found in their possession. But it appears that no part of the property was found in the actual manual possession of any of the prisoners; it was found in various parts of a house or houses and premises said to be occupied by the prisoners and (as we gather) several other persons. But, whether each prisoner had a separate house, or whether they lived in common having separate apartments, and, in the latter case, whether any portion of the premises was common to all—on all these points which are most important in arriving at a right conclusion in this case, there is great confusion in the evidence, and, as far as we can see, no attempt to clear it up.

The deposition of witness No. 3 does not agree with the evidence of the Police Inspector. The former says he pointed out some Domes' houses and Nathoo Pasee's house to the jemadar, and that there were four Domes, the residents of the houses, and five Domes their visitors, besides four or five females. The Police Inspector, on the other hand, says that the four Domes lived in one house, and he takes no notice of the visitors at all.

Again, it does not appear what enquiries were made, and what evidence was given as to whether a sufficient cause existed why the attendance of witness No. 3 could not be procured. Unless the presence of the witness cannot, by any reasonable efforts, be procured, his deposition is inadmissible. The evidence on this point should be taken and recorded in the same way as the evidence on any other part of the case.

Moreover, we remark that a good deal of the evidence of the Police Inspector is mere hearsay, and ought not to have been received upon the important point as to where the things were found; and he was not examined with the accuracy which the case

Vol. VI. required. He gave his evidence in great detail before the Committing Magistrate, as also did witnesses Nos. 1 and 2, and the same ground should have been gone over by the Sessions Judge.

Had it been necessary to dispose of this appeal on the merits, this Court would have found the utmost difficulty in doing so. The evidence throughout is very shortly taken, and is not very easy to understand; the prisoners, the witnesses, and the articles stolen, being generally referred to by numbers, and in many cases without any distinction. And, upon the real difficulty in the case, the possession of the stolen property, there are scarcely any observations at all in the judgment of the Sessions Judge, though, from the little that is said, it seems as if the evidence were treated as if all bore with equal force against all the prisoners, which is very far from being the case.

It is with great reluctance that we so frequently make observations similar to the above upon the mode in which crimes have been investigated in the Courts below; but the paramount importance of the subject, which is no less than the due administration of the Criminal Law throughout the country, renders it incumbent upon us to point out what we consider to be irregularities in the investigation of cases which are brought to our notice.

The 20th November 1866.

Present :

The Hon'ble G. Loch, *Judge.*

Evidence—Confession.

Queen versus Kally Churn Lohar and others.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Hooghly, on a charge of dacoity, &c.

The confession of an accused person is only evidence against himself.

I SEE NO grounds for interfering with the sentence passed upon the prisoners, and I reject their appeal. In the copy of the charge, made by the Judge to the Jury, I find the following remark: "At the same time you will recollect that the confessions made by Kally and Sreekant must be accepted as evidence both against themselves and those that they implicate."

And throughout the charge I find that the Judge refers to these confessions; and, in drawing the attention of the Jury to the evidence against each prisoner, he remarks this man was implicated on the confession of Sreekant, and recognized by such and such witnesses. Now, the Judge must be aware of this first principle of law that the confession of an accused person is only evidence against himself, and therefore the Judge was wrong in referring to the confession of Sreekant as implicating other parties, and instructing the Jury that Sreekant's confession was good, not only against himself, but against others. The error made by the Judge in this case is not of consequence, as the parties convicted by the Jury confessed to the Magistrate, and those confessions were evidence against them. In summing up the evidence to the Jury, the Judge should have distinctly told them that the confessions of accused parties are only evidence against themselves, and should have instructed the Jury to put away from their minds whatever the confessing prisoners had said regarding their accomplices.

The 20th November 1866.

Present :

The Hon'ble G. Loch, *Judge.*

False Evidence—Charge (of Judge).

Queen versus Parbutty Churn Sircar.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Hooghly, on a charge of false evidence.

In a case of false evidence, it is not necessary for the Judge in his charge to show how the false statements, even if made intentionally, are material in the case.

THE prisoner has been convicted by the Jury of giving false evidence on various points, but the Sessions Judge does not, in his charge, show how these statements, even if made intentionally, were material in the case. Section 191, however, of the Penal Code defines false evidence to be any statement which is false, and which the party making it either knows or believes to be false, or does not believe to be true. The prisoner comes under this definition. I, therefore, reject the appeal.

The 22nd November 1866.

Present :

The Hon'ble G. Loch, *Judge*.

Evidence—Statements in grounds of commitment.

Queen versus Hurry Pershaud and others.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Rungpore, on a charge of voluntarily causing grievous hurt.

Where a Committing Officer in his grounds of commitment makes statements tending to criminate the prisoners, they cannot be used as evidence against the prisoners, if they were not reduced to writing, and without the examination on oath of the Committing Officer in the presence of the prisoners.

In the grounds of commitment, the Joint Magistrate states that the prisoners stated to the Police, and repeated before him, on the first day of trial, that they had caught the deceased stealing jack fruit, and had beaten and chased him away, and further on the Joint Magistrate makes further statements, all tending to criminate the prisoners, but which cannot be used as evidence against them, as their statements were not reduced to writing, and the Judge has not examined the Joint Magistrate on oath. As the evidence against the prisoners, especially Chuteeram and Ohloy Churn, is very weak, I think the record should be returned to the Judge under the provisions of Section 422, and that he be directed to examine the Joint Magistrate in the presence of the prisoners, and certify the result of such additional evidence to the Court.

The 27th November 1866.

Present :

The Hon'ble G. Loch and A. G. Macpherson, *Judges*.

Murder—Transportation.

Queen versus Bhootoo Mullick.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Hooghly, on a charge of murder.

A sentence of transportation other than for life is illegal in the case of a prisoner convicted of murder.

Loch, J.—The Sessions Judge's sentence is illegal. The Jury convict the prisoner of

wilful murder, but recommend him to mercy, but do not state any grounds for their recommendation. The Sessions Judge, listening to their recommendation, has sentenced the prisoner to transportation for 10 years. Under Section 302, the punishment for murder is either death or transportation for life. The Sessions Judge has no authority to pass a sentence of transportation for 10 years. As this sentence is contrary to law, we, under the provisions of Section 405 of Code of Criminal Procedure, revise it, and direct that the prisoner be transported for life.

The 27th November 1866.

Present :

The Hon'ble G. Loch, *Judge*.

Robbery—Theft.

Queen versus Hushrut Sheikh.

Committed by the Magistrate, and tried by the Sessions Judge of Dinagepore, on a charge of culpable homicide not amounting to murder.

By the infliction of grievous hurt, theft becomes robbery, and all parties concerned in the offence are liable to punishment.

The prisoner has been convicted under a Section of the Penal Code which does not cover the offence committed. The prisoners Hushrut and Rai Bux went to steal mangoes. One was on the tree, and the other was on guard below, when they were surprised by the owner of the orchard. The man below attacked the owner, and beat him with a lattee, and knocked him down senseless: and the thieves escaped before he had recovered his senses. The owner of the orchard, Kassim, died from the effect of the blows he had received, his skull having been fractured. Rai Bux was admitted to give evidence, and he stated that he and the prisoner Hushrut went to gather mangoes; that he was up the tree, and Hushrut below; that on Kassim interfering, Hushrut knocked him down; and, before he recovered his senses, they effected their escape.

The Sessions Judge accepts the evidence of Rai Bux to the extent that he and Hushrut went to steal; but, as there is no evi-

Vol. VI. dence to corroborate the rest of his statement that Hushrut inflicted the blows on Kassim, his evidence on this point, the Sessions Judge holds, cannot be relied on.

Admitting this to be the case, yet, as violence was used by one or other of the thieves, the offence becomes robbery, and not theft, and the Sessions Judge was wrong in convicting the prisoner under Section 382, *viz.*, of theft after having made preparation for causing death or hurt, &c. The illustration (A) under this Section clearly shews what is the offence spoken of. Had A in the illustration fired the loaded pistol and hurt Z, the offence would no longer have been confined to Section 382, but would have been robbery as defined in Section 390. Theft is robbery if, in order to the committing of the theft, or in committing theft, the offender for that end voluntarily causes to any person death or hurt, &c., and Section 394 provides that, if any person committing or in attempting to commit robbery voluntarily causes hurt, such person or any other person jointly concerned in committing or attempting to commit such robbery shall be punished with transportation for life, or with rigorous imprisonment up to ten years. Under these circumstances, therefore, it is clear that, by the infliction of grievous hurt, theft had become robbery, and that all parties concerned in the offence were liable to punishment, and therefore it was not very material, for the purpose of convicting the prisoner, whether Ral Bux or Hushrut were below the tree. Had it been proved that Hushrut was the one who struck the blow, the sentence upon him must, under Section 397, have been nothing under seven years' imprisonment. As it is, though I think the punishment inadequate to the offence, it is a legal one, and therefore I confirm it.

The 28th November 1866.

Present :

The Hon'ble G. Loch, Judge.

Murder—Culpable Homicide not amounting to Murder—Grievous Hurt.

Queen *versus* Hurry Dass Paul and others.

Committed by the Magistrate, and tried by the Sessions Judge of Mymensing, on

a charge of culpable homicide not amounting to murder.

Explanation of the difference between murder, culpable homicide not amounting to murder, and grievous hurt.

It appears to me that the Sessions Judge is wrong in convicting the prisoners of culpable homicide not amounting to murder under Section 304, and that they should have been convicted of grievous hurt under Section 320.

All culpable homicide is murder, unless it be accompanied with one or other of the exceptions given in Section 300, Penal Code. That Section distinctly describes the offence of murder as follows: Culpable homicide is murder—*1st*, if the act by which death was caused was done with the intention of causing death; *2nd*, if done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom harm is caused; *3rd*, if done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; *4th*, if the person committing the act knows that it is so immediately dangerous that it must, in all probability, cause such bodily injury as is likely to cause death, and commits such act without excuse for incurring the risk of causing death or such injury as aforesaid.

The punishment for culpable homicide not amounting to murder is set forth in Section 302.

Culpable homicide is not murder when the offender is deprived of self-control by grave and sudden provocation; *2nd*, when committed in the exercise in good faith of the right of self-defence; *3rd*, when the offender is a public servant, or aiding a public servant acting for the advancement of public justice; *4th*, when committed without premeditation in a sudden fight in the heat of passion; and, *5th*, where the person whose death is caused, being above eighteen years, suffers death, or takes the risk of death, with his own consent.

Section 304 provides for the punishment of persons convicted of culpable homicide not amounting to murder as described above.

It is to be observed that, in both classes of culpable homicide, intention or knowledge is included, and that it is only by reason of the existence of one or other of the exceptions mentioned in Section 300 that culpable homicide is taken out of the category of murder.

In the present case, there is no justification for the brutal conduct of the prisoners towards the thief, whom they had caught and bound. They must have known that, if a man is pounded and kicked till ten of his ribs are broken, and he be otherwise maltreated, they commit an injury sufficient in the ordinary course of nature to cause death; and, as none of the exceptions in Section 300 are pleaded, it is very questionable whether they should not have been convicted of murder.

If it be said that there was no intention to kill or to do such injury as was sufficient in the ordinary course of nature to cause death, then it appears to me that the conviction of culpable homicide not amounting to murder is incorrect, for that offence comprises intention, but the act is extenuated by one or other of the exceptional circumstances mentioned in Section 300. If, then, the offence of which the prisoners are guilty does not fall under the head of "culpable homicide not amounting to murder," and, from absence of intention to kill or to do such bodily injury as is sufficient to cause death, does not amount to murder, the only offence, of which the prisoners can be convicted, is that of grievous hurt.

Looking at the circumstances of the case, though the treatment of the captured thief by the prisoners was brutal, I do not think that they, Haradhun Paul and Ranjoy Paul, had any intention of killing him; but, in the excitement of the capture, they, with several others, were unsparing of their blows and kicks. The conduct of Cheeroo alias Sreenarayun, the next morning, was still more brutal, for he dragged the dying wretch about the compound by the rope with which he was tied, and, as it were, took away the least chance he might have had of getting over the effects of the severe beating he had endured on the previous night. No proof is adduced that the deceased was caught in the act of committing theft. Sushiram, in whose house the theft is said to have taken place, and who is reported to have captured the thief, has not been examined; and it is only stated generally in the evidence that Sushiram had caught a thief whom they were beating.

For the reasons given above, I think the prisoners should be convicted of committing grievous hurt under Section 320, Clause 8, and sentenced under Section 325. I, therefore, confirm the sentence passed upon them, and reject the appeal.

The 3rd December 1866.

Present :

The Hon'ble G. Loch and A. G.

Macpherson, *Judges*.

Evidence—Receiving stolen property.

Queen versus Doyal Shilydar and another.

Committed by the Assistant Magistrate, and tried by the Sessions Judge of West Burdwan, on a charge of dishonestly retaining stolen property.

Evidence of guilty knowledge is necessary to a conviction on a charge of dishonestly retaining stolen property.

Loch, J. I THINK that the conviction in this case cannot be sustained. The prisoners were not charged with having committed the dacoity; but, on the suspicion of the party robbed, their houses were searched, and certain articles, a gold muth, two silver haslies (necklaces), and some brass utensils, were found, and were claimed and identified by the complainants. There is no satisfactory evidence to shew that this property was concealed. The prisoners, to judge from their caste, are in a social position to warrant the belief that articles of this kind would be found in their houses. The identification of the property by the complainant and his witnesses is of the most general kind, while the prisoners claim it as belonging to them, and produce witnesses in support of their assertion. Now, though much reliance may not be put on the evidence of these witnesses, yet a conviction of a serious offence on a mere general allegation of identification of the property by one or two witnesses for the prosecution cannot be supported, and further it is to be observed that there is no evidence of the guilty knowledge which is necessary to constitute the offence of which the prisoners have been convicted. I would reverse the sentence passed by the Sessions Judge, and direct that the prisoners, appellants, be released.

Macpherson, J.—I also am of opinion that these prisoners ought to be acquitted and discharged, the offence with which they are charged not being proved against them with sufficient certainty. The evidence, as

Vol. VI. to the articles in question being the prosecutor's property, appears to me very unsatisfactory and unreliable: while, beyond the fact that at the trial the prisoners claimed the articles as their own, there is no evidence whatever of any guilty knowledge. The prisoners are acquitted, and must be released.

The 3rd December 1866.

Present:

The Hon'ble G. Loch and A. G.

Macpherson, *Judges*.

Practice—Section 36, Letters Patent.

Queen versus Sheikh Soobhanees and others.

Committed by the Magistrate, and tried by the Sessions Judge of Sylhet, on a charge of bringing false criminal charge with intent to injure, &c.

In the Sessions Court the prisoners were convicted and sentenced. On appeal to the High Court, the senior Judge held that the case against the prisoners was not proved, and the junior Judge held that there was sufficient evidence to support the conviction. As the two Judges differed in opinion, the conviction was, with reference to Section 36 of the Letters Patent, set aside, and the prisoners released.

Loch, J. (after going in detail through the evidence which is quite devoid of matter of general interest).—I THINK the charge of bringing a false accusation against Punnoo must be considered as not proven, and I would release the prisoners, reversing the order of the Judge.

Macpherson, J.—I am of opinion that, although the case is a somewhat doubtful one, there is sufficient evidence to support the conviction. I therefore would dismiss the appeal.

But, as Mr. Justice Loch takes a different view of the matter, the conviction must, with reference to the provisions of Section 36 of the Letters Patent, be set aside, and the prisoners must be released.

The 3rd December 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges*.

Dacoity—Transportation.

Queen versus Ramchand Punjah.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Hooghly, on a charge of dacoity.

In a case of dacoity, a sentence of 14 years' transportation was held illegal, and reduced to 10 years' transportation under Section 395 of the Penal Code.

Seton-Karr, J.—I CAN discern no reason for sending for the papers, as there is nothing as to which the Court's interference could be legally exercised, which cannot be settled at once.

The case was properly put to the Jury and, if they believed on the evidence, as they clearly did believe, that there was dacoity, that the prisoner was engaged in it, and that he fell into a tank and was captured on the spot, the conviction would be good, and could not possibly be touched.

Nothing worthy of any notice is mentioned in the appeal, but the sentence of 14 years' transportation is illegal; it must be reduced to 10 years' transportation under Section 395 of the Penal Code.

Kemp, J.—I concur.

The 10th December 1866.

Present:

The Hon'ble F. B. Kemp and W. Markb., *Judges*.

Wrongful Confinement—Section 152, Code Criminal Procedure.

Queen versus Suprosunno Ghosaul.

Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of wrongful confinement.

The time during which a party is kept in wrongful confinement is immaterial, except with reference to the extent of punishment.

In no case is a Police Officer justified by Section 152, Code of Criminal Procedure, in detaining a person for a single hour except upon some reasonable ground justified by all the circumstances of the case.

Kemp, J.—THE point now taken by the pleader was not urged below.

There appears to us to have been no misdirection to the Jury.

The whole evidence was submitted to their consideration; and they were told that if they believed the evidence, it was sufficient to support the charge of wrongful confinement.

The time during which a party is kept in wrongful confinement is immaterial, except with reference to the extent of punishment; the longer the period, the more severe being the punishment.

The pleader for the prisoner lays stress upon Section 152 of the Code of Criminal Procedure, as giving a Police Officer power to detain an accused person for a period not exceeding twenty-four hours without question.

But we read the Section very different. We are of opinion that in no case is a Police Officer justified by that Section in detaining a person for one single hour, except upon some reasonable ground justified by all the circumstances of the case. It is for the prisoner to shew that he had reasonable grounds, and he failed to do so; whereas it is clear he could have sent the accused party before the Magistrate at once. We confirm the sentence, and reject the appeal with the amendment that the sentence, in default of payment of the fine, be reduced to 3 months, which is the longest term which the law admits of.

The 10th December 1866.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

False Evidence.

Queen *versus* Nagbunsee Lall.

Committed by the Principal Sudder Ameen, and tried by the Sessions Judge of Tirhoot, on a charge of giving false evidence.

A conviction on a charge of giving false evidence was set aside, the alleged conflicting statements having been made after a lapse of 4 years, and there being no proof of deliberate intention to give false evidence, which was held to be the gist of the offence.

Kemp, J.—We acquit this prisoner. The statements said to be conflicting were made after a lapse of four years. We have not been shewn what the nature of the questions was which were put to the prisoner, and whether his attention was drawn to his former statement and to any discrepancy between that and his statement made after an interval of four years.

After all it appears that he stated in 1862 that Bakur was alone in possession; whereas in 1866 he associates other parties with Bakur. We cannot say that he was particularly questioned as to who were the co-

proprietors, or as to the nature of Bakur's possession in 1862, which may have been that of a trustee as senior member of the family, or in any other similar capacity.

There is an absence of proof of deliberate intention to give false evidence, which is the gist of the offence.

The prisoner must be released at once.

The 13th December 1866.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

**Culpable Homicide not amounting to murder—
Right of private defence.**

Queen *versus* Fuzza Meeah alias Fuzza Mahomed.

Committed by the Assistant Commissioner, and tried by the Officiating Deputy Commissioner of Cachar, on a charge of culpable homicide not amounting to murder.

In a case of culpable homicide not amounting to murder, it was held that, though the occasion might have been one in which the prisoner was justified in meeting force by force, still, as he inflicted a blow which he must have known was likely to cause death, he had exceeded his right of private defence with reference to Clause 4, Section 99 of the Penal Code.

Markby, J.—In this case the prisoner has been convicted of culpable homicide not amounting to murder.

It appears that the prisoner was the uncle of the deceased person, Golam Hossein, and that they were joint owners of certain land upon which they dwelt in separate houses within the same enclosure. The uncle was considerably older than the deceased, and had stood, to some extent, in the relation of father towards him, and had brought him up. The uncle wished to construct a path near to the house on the joint land, and the deceased was opposed to this. On the occasion in question, the uncle took his *kodal*, and commenced cutting a trench for the purpose of making the path, whereupon the nephew went up to prevent him. Some hot words passed, and ultimately the nephew with some violence seized the *kodal*, and attempted to wrest it from his uncle. The uncle thereupon recovered possession of the *kodal*, and with it struck his nephew a violent blow on the temple, driving the sharp edge of the *kodal* right through the skull into the brain of the deceased. This wound produced death in 18 days after it was inflicted. These facts are established by very clear

Vol. VI. evidence; but only two witnesses actually saw the affray, and they were at some distance, so that we have only a somewhat meagre account of what actually occurred. But there is no doubt that the deceased was the aggressive party, and that he assumed an attitude which would justify the prisoner in using *some* violence towards him. The Sessions Judge has found that the prisoner is not guilty of murder, because of the provocation; but we are not sure how far he considered the question, whether or not the prisoner was justified in inflicting the blow in the right of private defence within the meaning of Section 96 of the Indian Penal Code. We have considered this question, and upon the whole we have come to the conclusion that, though the occasion was one in which the prisoner was justified in meeting force by force, and might therefore have used some violence, still that he was not justified in inflicting a blow which the prisoner must have known was likely to cause death. We think that, in so doing, he exceeded his right of private defence, and therefore by Clause 4 of Section 99 of the Code this plea fails him. But, although we consider that the prisoner has rightly been found guilty of culpable homicide not amounting to murder, we think the sentence of 3 years' rigorous imprisonment passed upon him, under all the circumstances, somewhat too severe. We, therefore, order it to be annulled, and, in lieu thereof, pass upon the prisoner a sentence of one year's rigorous imprisonment.

The 13th December 1866.

Present:

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Sentence (by Magistrate).

Referred under Section 434, Act XXV. of 1861, and Circular, Order dated 15th January 1863, No. 18.

Jhoomuck Chamar.

A sentence of 4 years' imprisonment by a Magistrate is illegal as beyond his competency.

Kemp, J.—THE view taken by the Sessions Judge is correct. Section 75 of the Penal Code does not apply to this case at all.

The offences were committed at one and the same time, and the Magistrate, under Section 46 of the Code of Criminal Procedure, could sentence the prisoner within his competency.

The sentence of 4 years in the case in which Nadir Ally is prosecutor is therefore illegal, as beyond the competency of the Magistrate. It is, therefore, quashed, and the papers are returned in order that the Magistrate may pass a legal sentence, or commit the case to the Sessions, if he considers that the sentence he is competent to pass is inadequate.

The 13th December 1866.

Present:

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Jurisdiction—Bribery (to screen offender)—Conviction.

Reference by the Officiating Deputy Commissioner of Cachar, under Section 434, Act XXV. of 1861, and Circular Order, dated 15th July 1863.

Omrut Ram *versus* Nonao Ram and others.

A Subordinate Magistrate of the second class is not competent to initiate a charge, under Section 213 of the Penal Code, of accepting an illegal gratification to screen an offender.

Persons not formally charged or put on their defence cannot legally be convicted.

Case.—I HAVE the honor to forward, under Section 434 of the Code of Criminal Procedure, for the orders of the Court, the criminal records of certain cases in which the sentences passed by the Deputy Magistrate are in my opinion illegal.

2. The complaints made in these cases were, it will be observed, for the offence of assault under Section 352 in Cases Nos. 321, 352, 299, 296, 256, and 186, and for that of grievous hurt under Section 326 of the Penal Code in Case No. 8. Before the

final hearing of these cases, the complainants in them desired to withdraw their complaints, and filed petitions to that effect. The Deputy Magistrate refused to allow the cases to be compromised, and dismissed them, at the same time fining each complainant under Section 213 of the Penal Code for accepting illegal gratification in consideration of his screening an offender.

3. As the Deputy Magistrate is a subordinate Magistrate of the second class, and is not vested with powers under Section 1 of Act X. of 1854, he was acting beyond his jurisdiction when he initiated the cases under Section 213.

In addition to this, it seems that no evidence was taken to prove that the parties accused had taken any gratification in order to screen the offenders. No charge was framed, and the defence of the accused does not seem to have been taken in a single instance.

The judgment of the High Court was delivered as follows by—

Kemp, J.—We concur with the Officiating Deputy Commissioner of Cachar. The proceedings of the Deputy Magistrate are illegal, and are quashed. He is not competent to initiate a charge, and he has convicted parties of an offence of which they have not been formally charged or put on their defence.

The 17th December 1866.

Present :

The Hon'ble F. A. Glover,
Judge.

Evidence (of co-defendants).

Queen versus Ashruff Sheik and others.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Moorshedabad, on a charge of dacoity.

Where there is no community of interest, any one of a number of prisoners jointly indicted may be called as a witness either for or against his co-defendants.

THE prisoners in this case (one tried with the assistance of a Jury) have filed a long petition of appeal, in which they take various exceptions to the Sessions Judge's estimate

of the evidence; they do not, however, raise any point of law.

Before, however, considering the appeal as it stands, it may be as well to remark on the Sessions Judge's proceedings in respect of the defence-witnesses called by the prisoner Afsur Ali. This prisoner, it appears, wished to have the evidence of three of his fellow-prisoners taken of two of them, to prove that the offence which he and they had jointly committed, was simple theft, and not dacoity; and of the third to establish a plea of enmity between himself and the prosecutor. The Sessions Judge held that these witnesses could not legally give evidence in the case.

This appears to me much too broad an assertion. With regard to the two prisoners, who were to prove that the crime committed was theft, and not gang-robbery, the Sessions Judge was, I consider, right, as the prisoners so cited as witnesses were in precisely the same category as Afsur himself, and had a direct interest in procuring his discharge, whilst, as the crime charged against all the prisoners could only have been effected by the guilty concurrence of five or more individuals, the acquittal of Afsur would have led directly to the acquittal of the witness prisoners themselves, whilst his conviction would have been a material step in establishing their own guilt, *vide* Taylor on Evidence, 1223, Part 3, Chapter II.

But in ordinary cases, where there is no such community of interest, any one of a number of prisoners jointly indicted may be called as a witness, either for or against his co-defendants (*Reg. versus Coulton and Stevenson*), and I note the point for the Sessions Judge's future information and guidance. The only witness who could have been called in the present case was the prisoner Baluk Biswas; but, as his evidence was under the circumstances perfectly immaterial to the issue, the prisoner has not been in any way prejudiced by the omission.

For the rest the conviction of dacoity was based mainly upon the evidence of two approver-witnesses; but this evidence was, in accordance with the Full Bench ruling of this Court in the case of *Elahee Buksh*, legally sufficient for conviction, although uncorroborated, and the Sessions Judge in drawing the particular attention of the Jury to the nature of that evidence, and in advising them to accept it with great caution, did all that the law required him to do, and the verdict of the Jury on the facts cannot be disturbed. The appeals must be rejected.

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The 19th December 1866.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Conviction.

Referred under Section 434, Code of Criminal Procedure, and Circular Order No. 18, dated 15th July 1863.

Sameerooddeen and others.

Where the evidence for the prosecution was not taken, the prisoner was held to have been illegally convicted.

Kemp, J.—THE sentence passed by the Deputy Magistrate must be quashed.

The evidence for the prosecution was not taken, and the defendant has been convicted illegally.

We pass no opinion on the question whether compensation could be awarded to the complainant under Section 44 of the Code of Criminal Procedure had the conviction been a legal one, inasmuch as it is not so.

The 19th December 1866.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Evidence—Accomplice.

Referred under Court's Circular No. 17 of the 17th June 1863.

Sheikh Bechoo.

A person may call the woman with whom he is accused of having had sexual intercourse as a witness on his behalf.

A person is not, by reason of being an accomplice, disqualified from giving evidence either for or against a prisoner.

Kemp, J.—We are of opinion that in this case the prisoner ought to have been allowed to call the woman with whom he was accused of having sexual intercourse as a witness on his behalf. She was not an accomplice, but, even if so, a person is not, by reason of being an accomplice, disqualified from giving evidence either for or against a prisoner.

As, therefore, evidence has been improperly rejected, the sentence is contrary to law, and, acting under the powers conferred upon us by Section 405 of the Code of Criminal Procedure, we order the present conviction to be annulled, and a new trial to be had.

The 19th December 1866.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

House-breaking—Theft—Cumulative sentence.

Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated 15th July 1863.

Mussahur Daoudh.

Theft is the sequel of, and cannot be separated from, house-breaking. A cumulative sentence of 3 years' imprisonment was held to be illegal in such a case.

Kemp, J.—We agree with the Sessions Judge that the Deputy Magistrate was wrong in separating the offences in this case. The theft was the sequel of the house-breaking, and cannot be disconnected from the latter offence. The cumulative sentence of three years is illegal, as the Deputy Magistrate was competent to sentence for a term of two years only for the offence of house-breaking.

The conviction is amended, and the sentence altered to one of two years instead of three years' rigorous imprisonment.

The 21st December 1866.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

False evidence—Written reports of depositions.

Queen versus Kally Churn Gangooly,
Appellant.

Committed by the Assistant Commissioner, and tried by the Judicial Commissioner of Assam, on a charge of false evidence.

In a case of false evidence, reading extracts from the alleged conflicting statements of the prisoner is not sufficient to enable the jury to form a fair opinion on the

question. The whole of the deposition given on each occasion ought to be laid before the Jury.

Written reports of depositions are not evidence, except in the case provided for by Section 369 of the Code of Criminal Procedure.

Kemp, J.—In this case we think there has been an error in law in two respects.

The whole evidence laid before the Jury consisted of a short extract from the prisoner's evidence on a charge of bribery before the Magistrate, and another short extract from the prisoner's evidence on the same charge before the Sessions Judge.

We think that it is impossible for a Jury to form a fair opinion on the question of how far the statements are conflicting by simply reading these extracts, and that the whole deposition given on each occasion ought to have been laid before them.

We also observe that the words used by the prisoner on the two occasions were proved by the production of extracts from the examinations as taken down in writing, and attested by the Magistrate and Sessions Judge respectively. But such written reports of depositions are not evidence, except in the case provided for by Section 369 of the Criminal Procedure Code.

We, therefore, reverse the sentence, and order the prisoner to be discharged.

The 21st December 1866.

Present :

The Hon'ble F. B. Kemp and W. Markby, Judges.

Jurisdiction—Fine—Mischief (Destruction of land-marks).

Miscellaneous Case.

Queen versus Moorut Loll and others.

The Joint Magistrate was held not competent to direct under Section 44 of the Code of Criminal Procedure that a portion of a fine inflicted under Section 434 of the Penal Code be paid to an Ameen for the purpose of paying the expense of his deputation to restore the land-marks which had been destroyed by the opposite party.

Kemp, J.—We have heard the pleaders for the petitioner, and, without calling upon the other side, we are clearly of opinion that the Sessions Judge was right in amending the

order of the Joint Magistrate under the provisions of Section 419 of the Code of Criminal Procedure.

The Joint Magistrate was not competent to direct, under Section 44 of the said Code, that a portion of the fine inflicted under Section 434 of the Indian Penal Code be paid to an Ameen, for the purpose of paying the expense of his deputation to restore the land-marks which had been destroyed by the opposite party.

Under Section 44, the fine or a portion of it can only be paid to the person who has suffered by the offence, or as compensation for expenses incurred in prosecuting the case.

The order to appoint an Ameen to lay down a boundary was illegal, and the Sessions Judge was quite right in reversing that order.

The application is rejected.

The 22nd December 1866.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, Chief Justice, and the Hon'ble L. S. Jackson, Judge.

Recognizances to keep the peace.

Miscellaneous Case.

Petition of Birreshurree Pershad and another.

It should appear on the face of a Magistrate's order that he had received credible information that the persons ordered to enter into their recognizances were likely to commit a breach of the peace, or to do any act that might probably occasion a breach of the peace.

Peacock, C. J. It does not appear, on the face of the Magistrate's order, that he had received credible information that the persons ordered to enter into their recognizances were likely to commit a breach of the peace, or to do any act that might probably occasion a breach of the peace. Neither the facts stated on the face of his order, nor those which are stated in his letter of 29th November 1866, are tantamount to such credible information; nor does it appear that these persons had been convicted of any of the offences specified in Section 280 of the Code of Criminal Procedure.

The order is, therefore, not warranted by Section 280 or Section 282 of the Code of Criminal Procedure, and must be quashed, and the recognizances cancelled.

Or, 58.

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The 22nd December 1866.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Tender of pardon—Section 209, Code of Criminal Procedure.

Queen versus Chundee Churn Banerjee.

Committed by the Deputy Commissioner, and tried by the Judicial Commissioner of Assam, on a charge of giving a gratification to a Police Officer inducing him thereby to screen an offender from legal punishment.

A Magistrate is competent to tender a pardon to any person. The fact of such party being directly or indirectly concerned in the offence does not preclude him from being admitted as a witness for the Crown under Section 209 of the Code of Criminal Procedure.

Kemp, J. This prisoner was tried by Jury. The pleader for the prisoner objects to the conviction on two grounds :

1st.—That the witness, Serjeant White, ought not to have been admitted to give evidence for the prosecution under Section 209 of the Code of Criminal Procedure, inasmuch as he was a party implicated in the offence.

2nd.— That there was no legal evidence against the prisoner, and consequently that there has been a misdirection to the Jury.

On the *first* point we are of opinion that a Magistrate is competent to tender a pardon to any person, and that the fact of such party being directly or indirectly concerned in the offence does not preclude him from being admitted as a witness for the Crown under the provisions of Section 209 of the Code of Criminal Procedure. On the *second* point there was clearly legal evidence to go before the Jury. The witnesses Radha Chundra and the constable speak directly to the participation of the prisoner in the offence with which he is charged, and the Jury chose to believe this evidence.

The Court, therefore, seeing no reason to interfere, reject the appeal.

RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 3rd January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Power of High Court (to interfere with sentence)—Cumulative sentence—Limit of imprisonment—Section 46, Code of Criminal Procedure.

Referred Jurisdiction.

Queen *versus* Puban.

After a sentence has once been passed by a competent authority, the High Court has no more power to interfere with it than a private individual, except upon appeal, or on a reference, or by way of revision as provided by the Code of Criminal Procedure.

Sentences of imprisonment may be accumulated beyond the period of 14 years, notwithstanding Section 46 of that Code, which limit has reference only to sentences passed simultaneously, or passed upon charges tried simultaneously.

Markby, J.—In this case the prisoner, having already been frequently convicted, was convicted of cattle-stealing by an Assistant Magistrate in December 1865, and was then sentenced to four years' rigorous imprisonment.

On the 15th February 1866, that is, whilst the prisoner was then under sentence of imprisonment, he was tried for a second offence of cattle-stealing, was convicted, and sentenced to transportation for life.

On the same day, but not at the same time, he was tried and convicted on a third charge of cattle-stealing, but having been already sentenced to transportation for life, no further sentence was passed.

The prisoner then appealed to this Court, and this Court, being of opinion that the Sessions Judge had no power to pass a sentence of transportation for life, quashed that sentence, and, in lieu thereof, passed upon the prisoner a sentence of 7 years' rigorous imprisonment. The term of imprisonment inflicted by this sentence must, by the provisions of Section 480 of the Code of Criminal Procedure, commence at the expiration of the term of imprisonment to which the prisoner had previously been sentenced, that is to say, in December 1866. This Court also directed that the Sessions Judge should pass such sentence as he deemed proper in respect of the third conviction. Upon this, the Sessions

Judge passed a sentence of 7 years' rigorous imprisonment in respect of this conviction, which must also commence after the previous terms of imprisonment have expired, namely, in December 1876.

At the time the prisoner was tried in February, he stood committed on a fourth charge of cattle-stealing, but the witnesses were not in attendance; and, as the Sessions Judge had already sentenced the prisoner to transportation for life, he thought it necessary to postpone the case, and acquitted the prisoner on that charge.

Upon this proceeding being brought to the knowledge of this Court, the Sessions Judge was informed that it was erroneous, and that he ought to have tried the prisoner on the charge without reference to the previous convictions. This was accordingly done, and the prisoner, in August last, was convicted on the fourth charge of cattle-stealing. No sentence has been passed in this last case; and the Sessions Judge has applied to us for leave to cancel the sentence passed in December 1865, with a view, as we understand his application, of strengthening his own powers of punishment.

We are at a loss to conceive under what power it is supposed that this Court can grant the permission asked for. After a sentence has once been passed by a competent authority this Court has no more power to interfere with it than a private individual except upon appeal, or on a reference, or by way of revision as provided by the Code.

As, however, the Sessions Judge has applied to us with reference to the punishment of this prisoner, we think it desirable to point out how the question presents itself.

The prisoner stands already under sentence of imprisonment (or transportation if it has been commuted) up to December 1883, and any punishment which the Sessions Judge may now inflict must of necessity commence from the expiration of the previous sentences, that is, from December 1883. The Sessions Judge has power to inflict a sentence of imprisonment which may extend to seven years from that time.

It is for the Sessions Judge in his discretion to say whether the prisoner ought to suffer the whole or what part of this additional punishment.

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1st. VII. We do not consider that there is any ground for the supposition that sentences of imprisonment cannot be accumulated beyond the period of 14 years. By Section 46, when a person is convicted "at one time," which must mean at one trial, of two or more offences, then the Court may pass successive sentences of imprisonment on the prisoner, and that Section contains a proviso "that in no case shall the person be sentenced to imprisonment for a longer period than 14 years." But in Section 48, which provides for the punishment of persons who are already under sentence to imprisonment and transportation, there is no such restriction. It is obvious, therefore, that the limit of 14 years is fixed with reference to sentences passed simultaneously, or passed upon charges tried simultaneously.

The case is remitted to the Sessions Judge that he may pass sentence upon the prisoner, with reference to these observations.

The 3rd January 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Misdirection—Hearsay evidence.

Queen versus Kali Churn Gangooly.

Committed by the Deputy Commissioner of Kamroop, and tried by the Judicial Commissioner of Assam, on a charge of culpable homicide not amounting to murder.

The verdict of the Jury was reversed on the ground of misdirection by the Judicial Commissioner in not having left the cause of death and the prisoner's connection with certain attempts at bribery as questions for the consideration of the Jury.

The admission of hearsay evidence prohibited.

Markby, J.—In this case the prisoner Kali Churn has been convicted by a Jury of culpable homicide not amounting to murder, and has appealed to this Court against that conviction.

The ground of law upon which the prisoner's Counsel has impeached the conviction is misdirection by the Judicial Commissioner in his charge to the Jury. And the complaints which he makes of the summing up are four:—

First.—That the Judicial Commissioner was wrong in telling the Jury that the doctor was of opinion that the lungs of the deceased must have sustained some severe injury during life, whereas the evidence of the doctor is that the deceased may have

died from rapid inflammation produced by natural causes.

Secondly.—That the Judicial Commissioner was wrong in leaving to the Jury, as evidence against the prisoner, the statements made by the witnesses as to certain attempts made to bribe police officers and others in this case, inasmuch as there was nothing to shew that those attempts were, in any way, made at the suggestion or with the cognizance of the prisoner.

Thirdly.—That the Judicial Commissioner ought to have left to the Jury, as a separate question, whether or not the body produced to the surgeon was the right one

Fourthly.—That the attention of the Jury was not sufficiently drawn to the question of the extent to which the deceased was beaten by the prisoner.

With regard to the *first* and *second* of these objections, we are of opinion that they are well founded. As to the *first*, we think that the Judicial Commissioner ought to have left the cause of death as a distinct question to the Jury, pointing out the two theories suggested by the doctor from the *post mortem* examination, and how each of these theories was supported, or otherwise, by the other evidence in the case.

With regard to the *second*, we are not quite sure what impression the Judicial Commissioner intended to convey to the Jury; but we think that, whether he intended it or not, the impression they were likely to receive was that this evidence bore against the prisoner. We cannot, however, discover anything to shew that the prisoner was concerned in these attempts at bribery; but, even if there were, the fact ought not to have been assumed, but left to the Jury for their consideration.

With regard to the two other objections, we have some doubt whether there was any such misdirection as would entitle us to reverse the verdict of the Jury having regard to the provisions of Sections 426 and 439 of the Code of Criminal Procedure and to all the circumstances of the case; but, as we think that, upon the two first objections, the verdict ought to be reversed, it is not necessary to express any opinion upon them. We, therefore, under Section 419, order the verdict to be reversed, the result of which is that the proceedings on this trial will be annulled. This will not prevent the prisoner being again put upon his trial, and we think that this is a case in which a fresh trial ought to take place immediately.

Throughout the decision of this case, we adopt the view expressed by the majority of the Full Bench in the case of *Elahee Buksh*, reported in the 5th Volume of *Zutherland's Weekly Reporter, Criminal Rulings*, p. 80, as to the duty of this Court, sitting as a Court of Appeal, in criminal cases.

We also think it right to remark that a good deal of hearsay evidence was received in this case. Witnesses ought not to be allowed to make such statements, as it is impossible to remove their effect from the mind of the Jury.

The 3rd January 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Torture—Abetment.

Queen versus Tarinee Churn Chuttopadhya and others.

Committed by the Magistrate, and tried by the Sessions Judge, of Dinapore, on a charge of voluntarily causing hurt, &c.

Where several prisoners were all concerned in a case of torture, and were prosecuting a common object, each was held guilty as a principal, and not as an abettor of others.

Markby, J.—In this case eight prisoners, who are police officers, are charged, and are found guilty of having abetted each other, in voluntarily causing hurt for the purpose of torture, and obtaining restoration of property under Sections 330 and 109 of the Penal Code. Each of the prisoners has been sentenced to rigorous imprisonment for 7 years.

Of the eight prisoners, four, namely *Muramut Hossein*, *Luchmun Sing*, *Bhurut Hazaree*, and *Shumshere Khan*, have been already convicted of manslaughter, and sentenced to transportation for life, and that conviction and sentence has been affirmed by this Court on appeal. The conviction in this case is, as regards those prisoners, therefore, merely formal, but we may say that we are fully satisfied by the evidence that they are guilty.

Three of the other prisoners, *Bhurintun Tantee*, *Shubaktollah*, and *Joomun Seikh*, have not been previously convicted; the remaining prisoner *Tarinnee Churn*, an Inspector of Police, has been already convicted of abetting a similar offence to that now charged, and sentenced to 7 years' transportation, which conviction and sentence has been affirmed by us on appeal.

As regards the merits of this case, we find that the two Assessors concur with the Sessions Judge in finding that all the prisoners are guilty. We have examined the record of the evidence and the judgment of the Sessions Judge, and we find that the witnesses have been carefully examined, and their evidence fairly weighed and tested, and we therefore see no reason whatever for disturbing this conviction, which there was ample evidence to support. Indeed, the learned Counsel, who argued the case in favor of *Tarinnee Churn*, was unable to point out any defect in the trial before the Sessions Judge, and his only complaint against the evidence was that it was too vague and general.

With regard to this objection, it is true that the witnesses do speak in somewhat general terms, but they were cross-examined by practised advocates who failed to shake their testimony, and to whom they gave the details of the matter when they were asked. The Sessions Judge and the Assessors were satisfied of their veracity, and we can see no reason to discredit them.

The conviction and sentences will therefore be affirmed as against all the prisoners. We consider that the term of imprisonment of 14 years to which the Inspector *Tarinnee Churn* is subject for these two offences barely meets the requirements of justice, considering the terrible consequences of such conduct in a person of his position.

With regard to the form of the conviction, we think that is wrong. If, as the Sessions Judge appears to consider, the prisoners were all concerned in the torture, and were prosecuting a common object, then each is guilty as a principal, and not as an abettor of others, and they ought to have been so convicted. As, however, the prisoners have been in no way prejudiced by this error, which is of a purely technical nature, we cannot reverse the conviction on this ground.

The 4th January 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Torture—Arrest and wrongful confinement by Police Officers.

Queen versus Behary Sing and others.

Committed by the Magistrate, and tried by the Sessions Judge, of Rungpore.

Exposition of a police officer's powers of arrest and detention of accused persons and witnesses, with a view to the suppression of the practice of torture.

ol. VII. *Markby, J.*—THE short history of this most extraordinary case is as follows: In the month of Chyet last, a chowkeedar went to the house of a young woman named Cheepoo, residing at the village of Mooahdhopa, in the Zillah of Rungpore, and told her that a body had been found floating in an adjacent river, and at the same time asked her if she knew what had become of her father. The only reason for this proceeding on the part of the chowkeedar seems to have been a quarrel which had taken place between Cheepoo and her father, immediately after which her father had disappeared from the village. This occurred on the Wednesday, and, on the following day, information that the body was found was given at the nearest thannah. On the evening of Friday, a jemadar named Bany Madhub Roy, one of the prisoners, came to the village and took up his quarters at the house of one Elai Bux. From thence, on the following morning (Saturday), he sent for the woman Cheepoo, for a man named Rocha, and another man named Chand. The jemadar then went taking all these persons with him to the river side, to where the body was lying, and he then asked Cheepoo whose the body was. She said she could not distinguish whose body it was; that her father had left her in a rage. The jemadar then asked the neighbours whose body it was, and they said they did not know, but that Uttum (that was the name of Cheepoo's father) was absent, having gone away angry.

The jemadar then abused the people for not telling whose body it was, and took Cheepoo, Chand, Rocha, and also a man named Shabuk back to the house of Elai Bux; and Cheepoo states (and the Sessions Judge and Assessors believe her evidence to be mainly true) that the jemadar then said to her that she should escape if she said it was the body of her father. She replied that it was not the body of her father. The jemadar then struck her across the knees with a light cane. She repeated, however, that it was not the body of her father, and that she could not say that if the jemadar beat her. She says that she then passed the night with the jemadar, and that, on the following day (Sunday), about 12 o'clock, she consented to say that it was the body of her father. The jemadar then took her to the body which was just being carried off to the station. The body was set down, and Cheepoo, in the presence of the people, acknowledged that it was the body of her father. The jemadar then beat with a cane Shabuk, Chand, Rocha, and a fourth man

named Hunoo, saying: "The daughter of the dead man recognizes him, why do not you recognize him?" They said that, as Uttum was missing, perhaps it was his body. The jemadar told them to speak direct, and then they said it was his. The body was then sent into the station, and Cheepoo, Shabuk, Chand, Rocha, and Hunoo, were taken by the jemadar back to the house of Elai Bux. The jemadar then told Cheepoo to say that these men had murdered her father, and she consented, and also at his suggestion accused the fifth person named Gourmoney. At 3 o'clock of the same day, an Inspector, the prisoner Jugut Chunder Sein, came to the house of Elai Bux, and began to abuse Cheepoo, and said: "You must confess to the murder." The jemadar, however, interfered, and said: "She has confessed, and she is not to be abused." The Inspector then asked Chand why he did not confess, and he replied that he had not killed Uttum. Cheepoo says that the Inspector upon this beat Chand, but in this she is not corroborated by Chand himself, who does not say he was beaten at this time. The Inspector then went away. Cheepoo passed this night also with the jemadar in Elai Bux's house, the five accused persons being in the same house under the charge of some constables; and these five persons all state that during the night they were tortured in various ways by the three constables who are now prisoners in this case to make them confess to having murdered Uttum, and which the next morning they all accordingly did.

The next day (Monday), the whole party proceeded to the station whither the Inspector had already gone, and from that time the Inspector seems to have taken charge of Cheepoo, and she says that on that night she slept with him. The Inspector took down the confessions of the accused persons, and on the following day (Tuesday) they were sent in to the Magistrate, having been in custody since Sunday. On the next day (or the day after Wednesday or Thursday), the case was enquired into by the Magistrate, when just as Cheepoo was narrating with the utmost particularity how her father had been murdered by the accused persons, he himself made his appearance in the cutchery. Cheepoo at first, prompted by the Inspector, denied it was her father; but, as several persons recognized him, this was useless, and the whole story came out.

The three constables, Beharee Sing, Khatiboolah, and Tumizooden, have been convicted of causing hurt for the purpose of extorting a

confession under Section 330 of the Penal Code. Jugut Chunder Sein, the Inspector, and Banee Madhub, the jemadar, have been convicted of abetting the above-named prisoners in committing this offence under Section 114.

All the prisoners have appealed: but, with the exception of Jugut Chunder Sein, the Inspector, upon whose case we have already signified our opinion, we think that all the prisoners have been rightly convicted. The case of the three constables was not argued by Counsel; but we have considered the whole evidence, and see no reason whatever to discredit the story told by the persons who allege that they were severely beaten by these three men on the Sunday night in order to induce them to confess. The case of the jemadar Banee Madhub was argued at some length. He has been convicted of abetting only, the Sessions Judge not being convinced by the evidence that he actually struck the prisoners. The Sessions Judge, speaking from his own experience of native character, and especially of the native Police, considered it impossible that the torture could have been inflicted by the inferior constables without the consent and approbation of their superiors: and, taking this view, he convicted both the jemadar and the Inspector. We were, however, of opinion that such an inference from past experience, unsupported by any facts, was not sufficient to support a criminal conviction: and, as in the case of the Inspector there was an absence of any such facts, we acquitted him. But the case of the jemadar is very different. He was there from the first. He was the first to suggest, and the most active in carrying out the whole of this diabolical contrivance to obtain false evidence: though he may have struck no blows with his own hand, his conduct was undoubtedly violent in the extreme: and, lastly, during the whole of the period during which the torture was inflicted, the prisoners were in his custody: he was in the same house with them: and not only was it his imperative duty to have known, but we think he must have known the treatment to which they were subjected. We, therefore, confirm the conviction as against the jemadar Banee Madhub also.

From the number and nature of these cases which come before us, we fear that such acts of violence and oppression on the part of the Police are far from rare: and we think it right prominently to notice them, in order that the subject may receive attention in the proper quarter. In the meantime, we con-

sider it our duty to point out that, if the existing provisions of the Code of Criminal Procedure were rigidly enforced (and we consider it the duty of every judicial officer, as well as of every Police authority, to see that this is done), such atrocities as these would be almost impossible.

It seems to be generally supposed, and the supposition seems to be generally acted on, that Police-officers, in making enquiries into criminal cases, are limited only by their own discretion as to what persons they may arrest and detain in custody. But, so far from this being the case, the powers of a Police-officer to arrest without warrant are strictly defined by the Code of Criminal Procedure. The widest power is that conferred by para. 2 of Section 100, which provides that a Police-officer may arrest without orders from a Magistrate, and without warrant any person against whom a *reasonable* complaint has been made, or a *reasonable* suspicion exists of his having been concerned in any offence specified in the Schedule to the Act as offences for which Police-officers may arrest without a warrant. What is a reasonable complaint or suspicion must depend on the circumstances of each particular case: but it must be at least founded on some definite fact tending to throw suspicion on the person arrested, and not on mere vague surmise or information. Still less have the Police any power to arrest persons as they appear sometimes to do, merely on the chance of something being hereafter proved against them. Any wilful excess by a Police-officer of his legal powers of arrest is, by Section 220 of the Penal Code, an offence punishable by imprisonment for seven years.

With regard to persons whose evidence is required by a Police-officer making an enquiry, no power exists to arrest or detain them for a single moment. An officer in charge of a Police-station may, under Section 144, by an order in writing, require the attendance before him of persons whose evidence is necessary, and the person summoned is bound to obey the order: but in no case can the Police-officer compel a witness by force to attend before him.

Moreover, if, as is frequently the case, a Police-officer, without arresting a person himself, directs some of the neighbours to take charge of him, the Police-officer is responsible in the same way as if he had himself made the arrest, the person arrested by his order being in law in his custody.

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Moreover, even if a person be rightly arrested, it does not rest with the discretion of the Police-officer to keep the prisoner in custody where and as long as he pleases. Under no circumstances can he be detained without the special order of a Magistrate more than 24 hours. At the expiration of 24 hours, unless the special order has been obtained, the prisoner must either be discharged or sent on to the Magistrate, and any longer detention is absolutely unlawful; and though the Code is not so express upon the place as the time of confinement, still we think it is perfectly clear that it was intended that, where a Police-officer arrested any person, the prisoner should not be kept in confinement in any place which the subordinate officer might select, but that he should, if possible, be sent immediately to the Police-station, and be placed in the custody of the officer in charge of the station, who is the person entrusted by the Act with the conduct of the enquiry.

If these provisions of the Legislature were strictly enforced, and supplemented by a few rules in the same spirit by the Police authorities, it is clear that such crimes as that which has suggested these remarks could not be committed except under circumstances which would justify a superior officer being held responsible for them. That even superior officers of Police are not incapable of ill-treating the prisoners under their charge has unfortunately been shewn by cases which have come recently before us, but this comparatively small number of officers, it may not, by careful administration, be altogether hopeless to improve.

The 4th January 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Conviction—Verdict of Jury—Opinion of Judge.

Queen versus Chand Bagdee and others.

Committed by the Magistrate, and tried by the Sessions Judge of East Burdwan, on a charge of dacoity.

A conviction upon no evidence is wrong in point of law.

A Sessions Judge ought to record distinctly whether or not he agrees in the verdict of the Jury.

Markby, J.—In this case eleven prisoners have been convicted by a Jury on a charge of dacoity.

The Sessions Judge very clearly pointed out to the Jury that, against seven of the prisoners, there was no evidence at all; he also commented on the extreme weakness of the evidence against three of the other prisoners, and the grounds for suspecting the genuineness of the confession of the remaining one.

In spite of these remarks, the Jury thought proper to bring in a verdict of guilty against all the prisoners, and we have to consider whether such a conviction is legal.

As against the seven prisoners against whom the Sessions Judge told the Jury that there was no evidence, we think it is clearly illegal.

A conviction upon no evidence is wrong in point of law.

The convictions of these seven prisoners will, therefore, be all quashed.

As regards the three prisoners, Redoy Bowree, Godai Dome, and Gopee Nath Haree, the Sessions Judge appears to have thought there was some slight evidence, though he intimates a pretty clear opinion that it was insufficient to support a conviction.

Had we agreed with the Sessions Judge in thinking that there was some evidence against these three prisoners, however dissatisfied we might be with the verdict of the Jury, we should have no power to interfere; but we think there was no evidence against these three prisoners also.

The statement of Redoy Bowree might rather be called an assertion of innocence than a confession of guilt. The statement of Godai Dome that he was out that night committing a theft, is no evidence whatever that he was engaged in this dacoity. And the so-called evidence against Gopee Nath Haree is that he stated before the Assistant Magistrate that a dacoit struck him, and a witness named Pooran states that he struck "a dacoit;" therefore (it is argued for the prosecution), Gopee Nath must be the person struck by Pooran, and, therefore, he must be a dacoit. A more flagrant instance of *non sequitur* can hardly be imagined.

In the cases of these three prisoners also, therefore, we think there was no evidence against them, and that the Sessions Judge ought so to have directed the Jury. It follows that the convictions are illegal, and they are therefore quashed.

In the case of the remaining prisoner, Nimai Dome, we share the doubts expressed by the Sessions Judge as to the genuineness

of the confession made by this prisoner and since retracted. The case against this prisoner was one which required very close and attentive consideration. But the lamentable incompetence which this Jury has displayed in the performance of their duties, with respect to the other ten prisoners, does not induce us to place much reliance on their verdict in this case.

We are, however, unable to say that there was no evidence against the prisoner upon which the Jury would be justified in convicting the prisoner; and the law has made the verdict of a Jury once passed upon the evidence final. With this verdict, therefore, we are unable to interfere.

If the Sessions Judge is of opinion that the prisoner has been improperly convicted, he may and ought to bring his case to the notice of the proper authorities, as one to which the clemency of the Crown ought to be extended.

The Sessions Judge ought to have recorded distinctly for the information of this Court, whether or no he agreed in the verdict of the Jury.

The 4th January 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Evidence—Previous convictions.

Queen versus Thakoordas Chootur and others.

Committed by the Magistrate, and tried by the Sessions Judge of West Burdwan, on a charge of dacoity being armed with deadly weapon.

Previous convictions are not admissible in evidence.

Markby, J.—In this case we have no doubt as to the propriety of the convictions and sentences as against all the prisoners except Thakoordass.

Our doubt in the case of Thakoordass arises from an observation by the Sessions Judge in his judgment that this prisoner was charged with dacoity on a former occasion.

The evidence was that the prisoner was charged, but not convicted. Even if he had been convicted, it would have been improper to receive this conviction as evidence in support of the present charge. Still more improper was it to receive as such when the former charge was not supported.

We have hesitated whether or no this conviction could be supported; but for the

reasons already stated in the case of Beharee Dosadh which has just come before us, we think we ought not to quash the conviction, unless there has been a failure of justice, or the prisoner has been prejudiced.

We think the case so clear against the prisoner Thakoordass, that, independently of this evidence, he ought to have been, and would have been, convicted.

We, therefore, affirm the convictions and sentences as against all the prisoners.

The 4th January 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Evidence (of bad character)—Misreception of evidence—Irregularity.

Queen versus Beharee Dosadh and others.

Committed by the Magistrate, and tried by the Sessions Judge of Gya, on a charge of being a member of a party of more than 5 persons who conjointly committed robbery.

Evidence of bad character is not admissible.

Misreception of evidence is a defect or irregularity within the meaning of Sections 426 and 439, Code of Criminal Procedure.

Markby, J.—With regard to all the prisoners except Beharee Dosadh, we think the convictions and sentences ought to be affirmed.

With respect to Beharee Dosadh, we should have had no doubt, but for the remark of the Sessions Judge in his judgment, which shews that he relies, to some extent, on the evidence of the Sub-Inspector that this prisoner was of a well-known bad character.

Such evidence is not admissible and ought not to have been received—still less relied on; and we have hesitated whether we ought not to quash the conviction of this prisoner, by reason of this evidence having been improperly received.

There is, however, such ample evidence against the prisoner Beharee Dosadh, independently of the evidence of character, that we do not think it necessary on this ground to quash the conviction recorded against him. We think the misreception of evidence is a "defect" or "irregularity" in the proceedings within the meaning of Sections 426 and 439 of the Code of Criminal Procedure; and that, in consequence of such error and irregularity in this case, the prisoner has not been prejudiced, and that there has been no failure of justice.

Vol. VII. All the appeals, therefore, are dismissed, and the convictions and sentences affirmed.

The 5th January 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Charge (Heads of)—Amendment (by Sessions Judge).

Criminal Jurisdiction.

Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated 15th July 1863.

Kalaram Sing and others.

Where several offences are charged under the same Section, the Committing Magistrate should frame the charge so as to contain a separate head for each offence. The omission of the Magistrate to do this may be remedied by the Sessions Judge exercising the powers of amendment contained in Section 244 of the Code of Criminal Procedure.

Markby, J.—UNDER Sections 238 and 241 of the Code of Criminal Procedure, the Committing Magistrate ought to have drawn a charge containing, under different heads, the several offences chargeable under the same Section. But this deficiency may be remedied by the Sessions Judge exercising the powers of amendment contained in Section 244, under which he may add the heads of charge omitted by the Magistrate.

It will, however, be as well for the Sessions Judge to consider how far it will be desirable to have all five offences tried together; and if he should consider that this will not be desirable, then his best course will be to try the prisoners under the present charge for one of the offences, and to direct the Magistrate to send in fresh charges in each of the other cases, which he can do without taking fresh depositions.

The 7th January 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Confession—Evidence (previous statements of witnesses).

Queen versus Kisto Mundul and others.

Referred case from Deputy Commissioner of Sonthal Pergunnahs.

An admission by A and B that the crime charged against them was committed by C and D, and that whatever share they had in it was under compulsion, is not a confession on which any person ought to be convicted.

Previous statements of witnesses on oath are not available as evidence in a subsequent trial.

Markby, J.—In this case five persons were charged, three named Kisto Mundul, Chubbee Sircar, and Banessur Mundul with murder, Raybuttee Dossee with abetting murder, and Surrusuttee Dossee with concealing a design to commit murder. All have been convicted; the three first have been sentenced to death, the fourth Raybuttee to transportation for life, and the other woman to five years' rigorous imprisonment.

The general evidence in the case establishes that the body of one Panchoo, an inhabitant of the same village with the prisoners, was found, on the morning of the 31st of July last, lying dead in a *dhan khet*, the head and body were immersed in water, but the feet not so. There were no marks of violence on the body, except a slight abrasion over the left eye, and it was the opinion of a native Civil Surgeon, who examined the body after death, that the cause of death was strangulation.

There is no doubt that Panchoo was of a dissolute character, and carried on intrigues with several women, amongst others with the prisoner Raybuttee Dossee. There was evidence also that Kisto Mundul carried on an intrigue with the same woman, and that some angry words had passed between him and Panchoo in consequence.

The direct evidence against the prisoner lies in a very narrow compass. It is that of three persons who live close to the prisoner Raybuttee. One, an old man, who sees imperfectly, says that on the night in question he was roused by his wife and went out, and he saw Raybuttee and her mother, the prisoner Surrusuttee, talking together; that on seeing him, Raybuttee said, "Two persons (naming them) have killed Panchoo. Don't tell any one, or you will be murdered, so take care." He neither saw nor heard anything else.

Nophoree Bewah, who lives in the same house with, and is a distant relation of, the last witness, says that she was aroused by her grandson, who wanted to go out to make water; that she went out with him, and saw the three prisoners, Kisto, Chubbee, and Banessur, carrying away the dead body of Panchoo from the house of Raybuttee. She says it was a very bright night, and that they passed within a few feet of her. She spoke to Raybuttee, who was standing there, and who described how the murder had taken place in her house. That, shortly afterwards, Raybuttee left her house with a bundle, but

returned after a short absence and began to smear her house; she says also that Surrusuttee was standing at the compound gate, when the dead body was carried out, as if on the watch. She did not tell the old man what she had seen.

The grandson, whose age is 8 or 9 years, was also called, and he says that he saw the three prisoners carry out the body.

The body was found (apparently for there is no accurate statement of distances) at a considerable distance from Raybuttee's house; but nearer to Raybuttee's house than the place where the body was found in the *dhan khet*, a bundle was picked up containing a *gamcha* half a quilt, a torn gunny bag, a cloth, and some string made of jute. The *gamcha* and quilt are said to have been stained with blood. Panchoo's son identified the *gamcha* as belonging to his father. The witness, who found the bundle, states that the gunny cloth was like some he had purchased for Raybuttee 3 years before, and that the string corresponded with that on Raybuttee's *charpoy*. This bundle was found in a track through the *dhan khet*, along which it is suggested that the body was carried.

Against Kisto and Chubbee this is the whole evidence, and they have always asserted their innocence.

It is clear, therefore, that the case against these prisoners depend entirely on the evidence of the woman Nophoree and the child.

We are surprised to find that it does not seem to have occurred to the Deputy Commissioner who tried this case that the story of these two persons is in itself highly improbable. Why the three supposed murderers should have exposed themselves to the observation of these witnesses, it is impossible to conceive. But the doubt which thus arises is increased to absolute distrust, when we compare the evidence given at the trial, with the previous statements of these witnesses. Though such statements, whether made on oath or not, cannot be used by the prosecution against the prisoner, they may be used by the prisoner in his own favor to show that the witness has at other times told a story differing from his evidence at the trial. Nophoree was examined before the Assistant Commissioner on the 12th of October, and her statement then was, in the main, similar to that at the trial, except that, whereas she said at the trial that Raybuttee left her house with "a bundle, but what the bundle contained she could not see," she said before the Assistant Commissioner "that Ray-

buttee left the house with a piece of gunny and quilt."

But it appears that this woman was examined on the spot on the 1st of August, and on that occasion gave an account, differing in many most important particulars from both her subsequent statements. For example, on the 12th of October, and again at the trial, she describes herself as aroused by her grandson, and says that she did not hear any noise up to that time. Whereas on the 1st of August she says, "I was awakened by hearing a noise in Raybuttee's house." She then says she ascertained that a murder was being committed in Raybuttee's house, and that she aroused the old man Alum, told him what had happened, and proposed to call the Mundul. But, subsequently, on both occasions, she distinctly says that she did not tell Alum, and Alum says the same. She also says in her statement on the 1st of August that she saw Panchoo come to Raybuttee's house on the night of the murder; whereas, in that on the 12th of October, she says that she did not see him do so.

It is useless to go further and point out other inconsistencies in this woman's statements which are numerous and glaring. We have no hesitation in saying that she is altogether unworthy of credit.

The little boy's statements are equally inconsistent. He actually on the first occasion declared he saw Panchoo being beaten by the prisoners in Raybuttee's house. And we may here remark that the grandfather's statements will as little bear examination as that of the other two.

We, therefore, acquit the prisoners Kisto and Chubbee. We express our opinion, not only that they ought not to have been convicted, but that there is no evidence against them whatever worthy of credit.

With regard to the three other prisoners, the case stands thus. Rejecting as we feel bound to do the evidence of the three witnesses abovementioned, nothing whatever remains against these persons except their own confessions. Now the confession, which each of them made during the preliminary investigation of the case (but which was retracted at the trial) amounts to this, that the crime was committed by other persons, and that any share they had in it was under compulsion. It is scarcely necessary to point out that, though such a confession contains an important admission, it is not an admission of guilt; and that, upon such a

Vol. VII. confession alone, no person ought to be convicted.

We, therefore, think that the conviction of these three persons ought also to be quashed.

We feel bound to remark that, even had the case against the prisoners been much stronger than it is, we should have been bound to reverse it on account of frequent errors in the reception of evidence. The Deputy Commissioner, who tried this case, constantly uses the statements of the prisoners as evidence, not only against themselves, but as against all persons whom they implicate; and he was evidently under the impression, and acted upon it, that previous statements of the witnesses on oath were available as evidence against the prisoners on this trial. It would be impossible to support any conviction in the face of errors of this description.

The 19th January 1867.

Present.

The Hon'ble Sir Barnes Peacock, *Kt.*, Chief Justice, and the Hon'ble F. B. Kemp and W. Markby, *Judges*.

Appeal—Maintenance of illegitimate child—Section 316, Code of Criminal Procedure.

Referred Jurisdiction.

Queen versus Golam Hossein Chowdhry.

Where the Magistrate, under Section 316, Code of Criminal Procedure, ordered a person to make a monthly allowance for the support of an illegitimate child—**HELD** by the majority of the Court (Markby, *J.*, dissenting) that there was no conviction of an offence, and that consequently no appeal lay.

Markby, J.—In this case I have the misfortune to differ with the other two Judges of the Court, and the fact that these two learned Judges have come to a different conclusion, makes me very doubtful as to the propriety of my own.

It appears to me that there is an appeal in this case from the order of the Magistrate. The order of the Magistrate is made under Section 316 of the Code of Criminal Procedure, which provides that, if any person, having sufficient means, neglects or refuses to maintain his illegitimate child, it shall be lawful for the Magistrate of the District, or other officer exercising the powers of a Magistrate, upon due proof thereof, to order such person to make a monthly allowance for the maintenance of such child, at such monthly rate, not exceeding 50 rupees in

the whole, as to the Magistrate or other officer as aforesaid shall seem reasonable; and that, if such sum is not paid, then the Magistrate may, for every breach of the order, by warrant, direct the amount due to be levied in the manner provided for levying fines, or may order such person to be imprisoned for any term not exceeding one month.

I take it upon that Section that, if a person, after the order of a Magistrate for the maintenance of his illegitimate child, neglects to pay the amount ordered, the subsequent proceedings are simply by way of execution of the original order. It cannot be said that there is a fresh offence; for if there were a fresh offence, a fresh proceeding and a fresh trial would be necessary: consequently, all the subsequent proceedings must be taken to be by way of enforcing the original order. Therefore, it appears to me that, under Section 316, if a person neglects or refuses to maintain his illegitimate child, the Magistrate has the power to order the person to pay a sum of money, which order is to be enforced in a way similar to that in which other criminal orders are enforced.

The question then arises, whether such person has been *tried* and *convicted* within the meaning of Section 109. That there has been a trial, is quite certain. The only doubt upon my mind is as to the word "*convicted*."

That there was a duty, and a breach of that duty, is also quite clear; otherwise, the defendant could not have been brought into Court at all; and it appears to me that, wherever a duty is enforced, and any breach of that duty subjects a person to criminal consequences, in that case such person may be said to be *convicted*. The word "*convicted*" is, I think, used, not with reference to the nature of the duty to be performed, but with reference to the nature of the proceeding by which the performance of it is enforced. I, therefore, think that, in this case, the appellant has been convicted, although he may not have committed an offence in the ordinary sense of the term, and that an appeal does lie.

Peacock, C. J.—I regret to differ from my learned brother in the judgment which he has now given.

It appears to me that the question whether an appeal lies in this case from the order of the Magistrate, depends upon the construction of Sections 409 and 414 of the Code of Criminal Procedure.

Section 409 says that "any person convicted on a trial held by the Magistrate

"of the District, or other officer exercising the powers of a Magistrate, or required by such Magistrate or other officer, under Section 295 or Section 296 of this Act, to give security for good behaviour, may appeal to the Court of Session to which such Magistrate or other officer is subordinate."

Section 411 says that, "in all cases in which a Court of Session or the Magistrate of a District, or other officer exercising the powers of a Magistrate, shall pass a sentence of imprisonment not exceeding one month, or of a fine not exceeding 50 rupees, no appeal shall be allowed."

Section 414 says that, "unless otherwise provided by this Act, or by any other law for the time being in force, no appeal shall lie from any order or sentence of a Criminal Court."

It appears to me that the words "convicted on a trial held by the Magistrate" in Section 409 must mean convicted of an offence; and the question would depend on Section 316 whether the appellant, when he was brought before the Magistrate on the allegation that he had refused or neglected to maintain his illegitimate child, was guilty of an offence. It appears to me that he was not guilty of any offence at that time; but that all that the Magistrate could do was to order the appellant to make such monthly allowance as he might think reasonable not exceeding 50 rupees. If the appellant had wilfully neglected to comply with the order of the Magistrate, the amount might have been levied in the manner provided for levying fines, or the appellant might have been imprisoned for a term not exceeding one month.

It is unnecessary to decide whether a wilful neglect to comply with an order of maintenance would be an offence. This is an appeal from the order itself, and not from an order made in respect of a breach of it. It appears to me that, when the Magistrate ordered the appellant to make a monthly allowance for the support of the child, he did not thereby convict the appellant of an offence. I am of opinion, therefore, that there was no conviction, and, consequently, that no appeal lies. As Mr. Justice Kemp concurs with me, the appeal must be dismissed.

Kemp, J.—I entirely concur in the judgment of the learned Chief Justice.

The 14th January 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Jurisdiction—Robbery.

Referred under Sections 434 and 435 of the Code of Criminal Procedure.

Madhub Ghose versus Bullye Metea and others.

A charge of robbery under Section 392 of the Penal Code is, under Act VIII. of 1860, triable only by the Court of Session, or by the Magistrate of the District, but not by a Deputy Magistrate.

Glover, J.—We agree with the Sessions Judge that the order of the Deputy Magistrate was illegal, and should be quashed.

But we also draw the Sessions Judge's attention to the fact that the charge of robbery under Section 392 of the Penal Code was, under Act VIII. of 1866, triable only by the Court of Session or by the Magistrate of the District, and that the Deputy Magistrate had from the first no jurisdiction whatever even on the lesser charge investigated by him.

We direct, therefore, that his proceedings be quashed, and that the Magistrate, or some other officer, having the power of making commitments, take up the charge of dacoity against the prisoners, and commit them to the Sessions on that charge, should he find the evidence sufficient to authorize such a course.

We direct, further, that the Deputy Magistrate be informed that the Court looks upon his proceedings in this case with great dissatisfaction.

The 14th January 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Amends—Wrongful Confinement.

Referred under Section 434 of Act XXV. of 1861 and Circular Order No. 18, dated the 15th July 1863.

Jharu versus Bahar Ali and others.

Amends cannot be awarded in a case of wrongful confinement.

Glover, J.—We agree with the Officiating Magistrate that the Deputy Magistrate's orders in this case are illegal, and must be quashed.

Vol. VII. The charge made was "wrongful confinement" under Section 342, Penal Code; and as this was an offence punishable with imprisonment for more than 6 months, it came under Chapter XIV. of the Procedure Code, even though a summons might be ordinarily issued instead of a warrant.

It has been often ruled by this Court that amends can only be awarded in cases coming under Chapter XV. of the Code of Criminal Procedure, and we therefore annul the Deputy Magistrate's orders, and direct that the fine, if levied, be refunded.

The 14th January 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Land Disputes.

Gunga Narain Poddar *versus* Deboo Mundul.

Appeal from an order of the Sessions Judge of West Burdwan, reversing that of the Deputy Magistrate.

On a charge of forcible ejectment, a Magistrate has nothing to do with the rights of the parties to the land.

Glover, J.—We agree with the Sessions Judge that the Deputy Magistrate's order must be quashed.

The charge of forcible ejectment, threatening, &c., ought to have been enquired into on the evidence, and the Deputy Magistrate, in ignoring it, and proceeding on what he considered the rights of the parties to the land, was not justified by law.

His orders are annulled, and he will be directed to take up the case *de novo* passing such orders on the evidence as may appear necessary.

The 14th January 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Amends—House-breaking by night—Theft.

Reference from the Sessions Judge of Dinagapore.

Dhurai Noshyo *versus* Hubee Noshyo.

Amends cannot be awarded in a case of house-breaking by night or theft.

Glover, J.—We think that the Deputy Magistrate's order in this case was illegal, and should be quashed.

The case, as preferred at the thannah, was one of house-breaking by night under Section 457 of the Penal Code, and the accused pleaded to a charge of theft before the Deputy Magistrate. The case was therefore, one coming under Chapter XIV. of the Code of Criminal Procedure, for which as has been frequently ruled by the Court "amends" in the shape of fine from the plaintiff cannot be awarded.

We observe that the Magistrate is in error in supposing that the accused was not called upon to answer. The record of the Deputy Magistrate's proceedings shews that he was distinctly accused of theft, and pleaded to the charge, denying his guilt *in toto*.

We quash the Deputy Magistrate's order and direct that the fine, if levied, be returned by the plaintiff.

The 14th January 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover
Judges.

Execution of process of Civil Court—Use of force by Bailiff.

Referred under Section 434 of the Code of Criminal Procedure.

John Anderson *versus* J. McQueen.

A Civil Court's bailiff, in executing a process against the moveable property of a judgment-debtor, has authority to use force, and break open a door or gate.

Kemp, J.—Read a letter from the Sessions Judge of the 24-Pergunnahs, dated the 4th January, submitting the record of a case tried by the Joint Magistrate, in which the bailiff of the Judge's Court has been fined two rupees under the provisions of Section 426 and Section 105, Chapter 155 of the 53rd Geo. III. In the present case the bailiff was clearly acting beyond the scope of his authority. It is manifest from the evidence of the nazir of the Civil Court of the 24 Pergunnahs that no instructions were given to the bailiff to break open the gate of the judgment-debtor, Mr. McQueen. We know of no law by which a bailiff is authorized in executing a process against the moveable property of a judgment-debtor, to use force and to break open a door or gate.

The Joint Magistrate having found on the evidence that force was used, and that the bailiff was acting wholly on his own authority and beyond the scope of his instruction this Court sees no reason to question the legality of the Joint Magistrate's proceeding.

The papers are returned to the Sessions Judge.

The 14th January 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Jurisdiction—Illegal Confinement.

Referred under Section 434 of the Code of Criminal Procedure and Circular Order No. 18, dated the 15th July 1863.

Queen versus Komul Manjee and others.

The offence of illegal confinement for more than 10 days is triable only by the Court of Session or by the Magistrate of the District, but not by a Deputy Magistrate.

Glover, J.—In this case we are of opinion that the Deputy Magistrate had no jurisdiction to try the case, and that all the proceedings in connection with it are in consequence null and void.

The charge was "illegal confinement for more than 10 days" under Section 344 of the Penal Code, an offence triable only by the Court of Session or by the Magistrate of the District.

Act VIII. of 1866 does not include Section 344 of the Penal Code, and the Deputy Magistrate had therefore no jurisdiction.

The 14th January 1867.

Present :

The Hon'ble J. P. Norman, *Judge*.

False Evidence.

Committed by the Magistrate, and tried by the Sessions Judge of Gya, on a charge of intentionally giving false evidence.

Queen versus Bhakoas Tutum.

In a case of false evidence, it is necessary to prove the deposition alleged to contain the false statement.

The prisoners have been convicted on a trial before the Sessions Judge of Gya and assessors of intentionally giving false evidence in a judicial proceeding, *viz.*, before the Court of Session.

In appeal they allege that the statement charged to be false is really true. It is not necessary to go into that matter at present.

Neither the Sessions Judge nor the Magistrate seems to have understood that it was necessary to put in and prove the deposition alleged to contain the false statement; in other words, the prosecutor must prove that the statement was made before he shows that it is false.

The case must be remanded to the Sessions Court, in order that evidence may be given to shew what it was that the prisoners stated in the Sessions Court, and that such statements were made on solemn affirmation under Act V. of 1840 or otherwise. He will certify the additional evidence to this Court under Section 422.

The 14th January 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Alternative finding.

Miscellaneous Reference.

Queen versus Tarinee Mytce.

An alternative finding is perfectly legal.

Glover, J.—In reply to this reference, the Sessions Judge should be informed that, in our opinion, an alternative finding is perfectly legal, and is expressly provided for in Section 72 of the Penal Code, and Section 382 of the Code of Criminal Procedure.

In the present case the Deputy Magistrate would have done well to convict under Section 411 of the Penal Code, but there is nothing in the law which prevents his making an alternative finding, if he was doubtful as to which head of the charge was proved.

The 16th January 1867.

Present :

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges*.

Culpable homicide not amounting to murder—Unlawful assembly.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of culpable homicide not amounting to murder, &c.

Queen versus Rubbeecoolah.

The prisoner was convicted and sentenced separately for culpable homicide not amounting to murder, and for being a member of an unlawful assembly. The two offences, however, being held to be one (the latter being only part of the evidence of the former), the conviction and sentence for the second offence were quashed.

Norman, J.—The prisoner has been convicted by the Sessions Judge of Backergunge of culpable homicide not amounting to murder, and of being a member of an unlawful assembly armed with deadly weapons. He has been sentenced to 7 years' rigorous imprisonment on the first charge, and to a

Jol. VII. further period of two years' imprisonment on the second charge. He appeals.

The facts appear to be that, on the 28th of June 1862, Azmutoolah, on the one side, and Kaloo, on the other, having collected their partisans, the two parties met and fought in a field near Azmutoolah's house. The men were armed with spears, pitch-forks, and *lattees*. Kaloo was pierced by a spear-wound given him by Kyamooddeen, and struck with a *lattee* by Dowlut. Mehecoolah received a wound inflicted with a spear by Buksoolah. Both Kaloo and Mehecoolah died of their wounds.

The prisoner Rubbeecoolah was present as one of Azmutoolah's party; but there was no evidence that he was armed, nor did any of the witnesses see him strike any blow.

He has, however, been convicted on the ground that, under Section 149, he must be deemed to be guilty of any offence committed by any member of the unlawful assembly in prosecution of the common object of that assembly, or which the members of that assembly knew to be likely to be committed in prosecution of that object.

The prisoner may think himself very fortunate that he was not put on his trial for, and found guilty of, murder. The two parties, armed as they were, must have attacked each other with the intention of causing such bodily injury as they must have known would be likely to cause death, and every one who joined in the common purpose of either assembly must have known that such bodily injuries would be likely to be inflicted.

It is clear, however, that the offence comes under the general definition of culpable homicide, and, therefore, the conviction, as it stands, is sustainable.

But it appears to me that the prisoner ought not to have been found guilty on a separate charge of being a member of an unlawful assembly. His offence was really single and entire, and the fact that he was present as a member of the unlawful assembly is really only part of the evidence of the major offence. It matters not that this portion of the case, if it stood alone, would constitute a distinct offence (*see* the Circular of the High Court, No. 16 of 1864—Prinsep, page 154). I would, therefore, quash the conviction on the second charge.

Seton-Karr, J.—I concur on the point of law raised by my learned brother, in the reduction of the whole sentence to 7 years as for the first charge only.

The 21st January 1867.

Present:

The Hon'ble J. P. Norman, *Judge*.

Murder.

Committed by the Magistrate, and tried by the Sessions Judge of Jessore, on a charge of murder.

Queen versus Poorusoollah Sikhdar.

In a case of murder, where a man was struck on the head in a boat with a heavy paddle and knocked overboard in a large river in the height of the rains, and had never been heard of since, it was held impossible to suppose that the man was still alive.

Norman, J.—THE prisoner has been convicted, by the Judge of Jessore, of the murder of one Bussirooddy, and sentenced to transportation for life. He appeals.

The only point is, that the body of the deceased has not been found. But, as the offence was committed in a boat by striking Bussirooddy on the head with a heavy paddle, knocking him overboard in a large river in the height of the rains; and as he has never been heard of since, I think the Judge was perfectly justified in coming to the conclusion that it is impossible to suppose that the man is still alive.

The case clearly resembles *Rex v. Hindmarsh*, 2 Leach 569, cited in *Russell on Crimes*, vol. 1, page 568.

The 21st January 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Penal recognizances to keep the peace.

Queen versus Gendoo Khan.

Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

The order of the Magistrate directing the prisoner, on the expiration of his sentence for the offence of criminal trespass, to execute personal recognizances to keep the peace, was upheld as legal and necessary.

Kemp, J.—THIS is a reference from the Sessions Judge of Mymensing under the provisions of Section 434.

One Gendoo Khan has been convicted by the Joint Magistrate of Mymensing, Mr. Glazier (who, we conclude, exercises the powers of a Magistrate), of criminal trespass under the provisions of Section 447 of the Indian Penal Code. The accused has further been called upon, on the expiration of

his present sentence for the above offence, to execute personal recognizances to keep the peace for the space of one year.

The Sessions Judge is of opinion that the call for penal recognizances is illegal, inasmuch as the offence with which Gendoo Khan was charged did not amount to a breach of the peace, and that, if not illegal, it was unnecessary. On referring to the record, we find that Gendoo Khan himself being armed with sword and shield, and accompanied by twenty or twenty-five other men, some of whom were armed with spears, at midnight entered the premises or homestead of the prosecutor's barn.

He shouted out and roused the villagers. On their approach, Gendoo Khan's party made off, but not before Gendoo Khan was recognized.

The conduct and acts of Gendoo Khan in our opinion clearly point to an intention upon his part to commit a breach of the peace within the meaning of Section 280 of the Code of Criminal Procedure.

The order of the Joint Magistrate was, therefore, strictly legal, and we are certainly not prepared to say that the call for penal recognizances was, under all the circumstances of the case, an unnecessary one. His order will, therefore, stand.

The papers are returned to the Sessions Judge.

The 23rd January 1867.

Present :

The Hon'ble Sir Barnes Peacock, *Cl.*, Chief Justice, and the Hon'ble F. B. Kemp and W. Markby, *Judges*.

Section 55, Code of Criminal Procedure—Plea of autrefois acquit.

Appeal against the order of the Sessions Judge of 24-Pergunnahs.

The Queen *versus* Dwarkanath Dutt.

Baboo Dwarkanath Mitter and Bhowanny Churn Dutt for Appellant.

Messrs. R. V. Doyne and F. J. Fergusson and Baboo Juggodanund Mookerjee for the Opposite Party.

To render a former acquittal or conviction a defence on a second trial, the offence must, according to Section 55 of the Code of Criminal Procedure, be the same offence.

The prisoner was charged with having forged pottahs *A* and *B* bearing the same date and adduced in evidence by him in the same suit. No mention of any charge as to pottah *B* was made in the order of commitment; and the prisoner having been acquitted on an indictment

for forging pottah *A*, it was held by the majority of the Court (Markby, J., dissenting) that the plea of *autrefois acquit* was inadmissible on a subsequent trial of the prisoner for forging pottah *B*.

Markby, J.—In this case I most unfeignedly regret that I am unable to concur in the judgment of the Chief Justice and Mr. Justice Kemp, and it is scarcely necessary for me to say with how much diffidence I give an opinion contrary to theirs.

The short history of this case is that, in the year 1863, a person of the name of Gray, of the Military Orphan Asylum, brought a suit against the prisoner to recover possession of certain land and godowns standing thereon. In that suit the prisoner filed two documents, both dated the 13th August 1858, and both purporting to have been granted to the prisoner by Gray on behalf of the Asylum, in respect of different portions of the land in dispute. The two pottahs were precisely similar in every respect, except the parcels of land to which they related.

The Sudder Ameen, who tried this suit, refused to receive the documents in evidence, because they were not produced till after the time appointed by him for that purpose. But, at the request of Gray, the documents were retained on the file, and Gray subsequently asked and obtained permission from the Sudder Ameen to take criminal proceedings against the prisoner, for attempting to use in evidence two documents which Gray alleged to be forged.

The proceedings were commenced on the 29th of December when Gray laid a charge before a Magistrate against the prisoner under Section 196, and also under Section 471 of the Indian Penal Code. On this occasion both documents were produced, and marked *A* and *B* respectively. The charge was made, and the evidence given in respect of both documents indiscriminately, and eventually the prisoner was committed on a charge containing three counts: *first*, for making a false document, "to wit, the Exhibit 4," under Section 465; *secondly*, with fraudulently and dishonestly using as genuine a document which he knew to be forged, "to wit, Exhibit *A*," under Section 471; *thirdly*, with corruptly intending to use as true and genuine evidence a document which he knew to be false and fabricated, "to wit, Exhibit *A*," under Section 196.

The "Exhibit *A*" mentioned in these three counts is *not* that described in the charge now under consideration, but the document so marked by the Magistrate. The document described in the present

Vol. VII. charge is the one which, on the investigation before the Magistrate, was marked *B*.

In February 1864 the prisoner was tried on a charge founded on the one on which he had been committed, and only differing from it in this respect, that the document in the first count mentioned, instead of being described as "Exhibit *A*," was described as "purporting to be a pottah granted by Mr. Charles James Gray, as Secretary to the Military Orphan Society, to Dwarkanath Dutt for one cottah 12½ gundahs of land, with a godown standing thereon, and dated 13th August 1858." And in the two following counts, the document was described by reference to the first count. Notwithstanding the form of the charge, evidence was given throughout indiscriminately with reference to both documents.

In charging the Jury, the Sessions Judge treated the charge as one of forging document *A* only, and, when describing the offence, spoke of that document only; but, when commenting on the evidence, he referred to both documents, and, after remarking on the striking resemblance between the alleged forgery and the admitted genuine signatures of Mr. Gray, the Judge proceeds thus: "The main point on which the prosecutor relies in regard to this resemblance is that the signature on this document and

* *i. e.* in the "on another document which civil suit. "was also filed by the prisoner"

"(the document *B*) are so exactly
"actly coincident in size and in every other
"particular as to show that one or both must
"be mere imitations. It is physically impossible, it is said, or, at least, exceedingly
"improbable that any two signatures of the
"same person should so exactly correspond
"in every particular, and the improbability
"is still further increased, when it is remembered that both these documents were said
"to have been signed at the same time." What the Counsel for the prosecutor had contended, and which the Judge here alludes to, was that both signatures, being so much alike, must have been traced from a third signature of Gray's which was genuine, and which the prisoner was proved to have had in his possession. The result of this trial was that the prisoner was acquitted.

On the 16th May 1866, a second charge was laid against the prisoner by Gray, and, on the charge being enquired into, the evidence was mainly addressed to the charges of forging and using document *B*, although the other document *A*, with respect to which

the prisoner had been tried and acquitted, was frequently alluded to.

The prisoner was ultimately again committed on three charges with respect to document *B* precisely similar to the charges on which he had been previously acquitted with respect to document *A*.

The trial on these charges also took place before Mr. Beaufort in July last. The vakeels, who appeared for the prisoner, objected to the trial proceeding, on the ground that the prisoner had been already tried and acquitted on these charges. They insisted on the fact that, throughout the former proceedings, both documents had been referred to; and also that, as both pottahs were filed at the same time in the Court of the Sudder Ameen, the using of both constituted one act only, and, as he was charged on the former trial with using one of these pottahs knowing it to be forged, he could not be again tried for using the other.

The objection was overruled, and the prisoner was convicted on all three charges. The prisoner has appealed, and has again raised this objection. The point was originally argued before Mr. Justice Kemp and myself, and has been again argued before us sitting with the Chief Justice.

The question is, whether the prisoner had been previously tried for these offences and acquitted for these offences within the meaning of Section 55 of the Code of Criminal Procedure: and, for convenience, I will consider the forgery first.

Whether or no the prisoner has been previously tried for the offence of forgery now under consideration, appears to me to depend on whether he is to be considered upon the whole evidence in both cases as having committed two offences of forgery or one.

I am not aware, nor did I hear in the course of the argument, of any general principle by which it can be at once recognized whether or no, in contemplation of law, a transaction constitutes one offence or several offences. It was, indeed, suggested that the singleness of the offence depended on the singleness of the act done by the offender. But, I think, this test manifestly fails. For on the one hand, it appears to me perfectly possible that a man may by one act commit several offences, as where he discharges a missile into a crowd, and wounds several persons; and, on the other hand, that a man may, by several acts, commit one offence, as where he inflicts several rapidly successive blows on one person, which constitute, believe it will be admitted, but one assault.

Moreover, it appears to me that there are a large number of cases in which it is entirely at the option of those who conduct the prosecution whether they will treat them as one offence or several. Acts closely connected together, or even one act producing several distinct consequences, may be made the foundation of several entirely distinct charges, or distinct counts in the same charge, but always with this qualification, that the evidence shall be confined to the particular acts charged.

In the case under consideration, I have no hesitation in saying that the forgery of these two pottahs might have been made the foundation of two separate counts in one charge, or even of two perfectly distinct prosecutions, had those who conducted the prosecution chosen to keep them distinct.

But the course taken in this prosecution was this. Before the Magistrate, on the occasion of the charge being laid in the first instance, the whole case as to the forgery of both pottahs was gone into. The prisoner was then committed (whether inadvertently or not is not material) for the forgery of one only. But evidence, notwithstanding, was given at the trial that both pottahs were forged, and, as has already been seen, the theory on which the prosecution principally relied was that both had been copied from a third genuine signature which was produced, and which had been in the prisoner's possession. This would be perfectly legal, if these two forgeries were so connected together as to form but one offence, and entirely in accordance with the practice in larceny, assaults, and other offences, when it frequently occurs that much more is proved than is stated in the indictment. But, if it was intended to treat these two forgeries as distinct, then it was wholly illegal to give this evidence as to the second forgery.

At the second trial, also, evidence was given as to the forgery of both pottahs, and the same theory as to the execution of the forgery was laid before the Jury: a course which was again illegal, if the offences were distinct.

It is said that the question now to be decided is not whether or no evidence was improperly admitted at the first or the second trial, and that any illegal proceeding on the part of the prosecution cannot change the nature of the offence. But this argument appears to me to be fallacious. As I have already said, I consider this to be one of those transactions which may be treated as constituting one offence or two offences at

the option of those who conduct the prosecution; and though, whatever takes place subsequently, the history of the transaction remains the same, I think the unity of the offence has, in the contemplation of law, been irrevocably determined by the course taken by the prosecution on the first trial. For these reasons it appears to me that the prisoner in this case has, in contemplation of law, committed but one offence of forgery only; that he has already been tried and acquitted for that offence within the meaning of Section 55 of the Code of Criminal Procedure; and that the present conviction is, therefore, illegal.

For similar reasons, it appears to me that the convictions on the two other counts in the charge are illegal also.

The result which I have come to appears to me to be not only that which is in accordance with the law, but also to be that which is most in accordance with the true interests of justice. For while it leaves to the prosecution a latitude of choice, often very useful, as to the course to be taken in the proceedings against an offender, it prevents that which it appears to me most desirable to prevent, conflicting verdicts of Juries upon the same evidence.

When the case was before Mr. Justice Kemp and myself in the first instance, two other objections were taken on behalf of the prisoner. The first was that he had not been allowed sufficient facilities for summoning his witnesses; and that objection we disposed of at that time, being of opinion that this was no ground of law which the prisoner could raise on appeal against the verdict of a Jury. The other objection was that the Judge was wrong in rejecting as evidence the deposition which a witness for the prisoner had made at a former trial, and which, as was alleged before us, was tendered on the ground that the witness was dead when the second trial took place. This point was argued before Mr. Justice Kemp and myself on the assumption that the evidence had been properly tendered at the trial, and we reserved the question of its admissibility for further consideration, together with the question arising on Section 55 of the Code of Criminal Procedure. Upon the second argument, the Judge's notes were searched, and then it appeared that there was no note of this deposition ever having been tendered at all. None of the Advocates employed at the trial, either for the prosecution or the defence, were present on either argument before us, nor was any affidavit filed as to what took place at the trial.

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On the other hand, it is clear from the Judge's own report of his charge to the Jury, that some application for the admission of depositions was made in the course of the trial by the Advocate for the prisoner, but no note of any such application appears to have been taken. The language used in the charge, however, rather appears to refer to an application to admit the depositions of the absent witnesses than of the one who was dead.

It is extremely unsatisfactory to me to have to come to a decision on such materials; but, on the whole, I do not feel justified in saying that this evidence was tendered. The point, therefore, as to its admissibility does not arise.

Peacock, C. J. I regret that I am obliged to differ from my hon'ble and learned colleague, Mr. Justice Markby. Were it not for the knowledge that he entertains a different opinion, I should have considered the present case a very clear one.

It is clear that, under the indictment for forging Exhibit *A*, the prisoner could not have been either convicted or acquitted of forging both Exhibits. Having been charged with the commission of one offence only, he could not be either convicted or acquitted of two separate and distinct offences.

If, under the charge on the first trial, the prisoner had been acquitted of forging Exhibit *A*, and had been found guilty of forging Exhibit *B*, and sentenced to punishment for the latter offence, it is clear that the conviction could not have been supported, inasmuch as the charge against the prisoner was confined to the forgery of *A*. In like manner, if the prisoner had been found guilty of forging *A*, and also of forging *B*, and had been sentenced to one punishment in respect of *A*, and to another punishment in respect of *B*, the sentence in respect of *B* must have been reversed, inasmuch as the charge did not extend to the forgery of *B*.

So, if, on the first trial, the prisoner had been convicted of forging Exhibit *A*, and sentenced to punishment for that offence, such former conviction would not have been a bar to the charge of forging *B*, and, if not, I cannot see how an acquittal of the forgery of *B*, under the charge of forging *A*, even if the defendant had been expressly acquitted of forging *B*, could have been set up as a bar to the charge of forging *B*, for a conviction and acquittal both fall under the same category in Section 55 of the Code of Criminal Procedure. In the present case, however, there was no express acquittal in respect of

the forgery of *B*. It is only to be inferred from the acquittal of the forgery of *A*, in consequence of evidence having been adduced, from which it might have been found that the signatures on *A* and *B* had both been traced from a genuine signature of the same person. There is nothing, however, conclusive in that finding. It is quite consistent with the evidence that *B* was forged, though *A* may have been genuine. How can the Court, which tries the prisoner for forging *B*, ascertain what credence was given by the Jury to the evidence on the first trial? They might have thought that the signatures to *A* and *B* were not so much alike as was supposed by the witnesses. They might have thought that the two genuine signatures did not resemble the signature with which they were compared. In that case it would have been wholly unnecessary for them to consider whether *B* was a forgery or not; and, indeed, it would have been the duty of the Judge, if they had delivered a verdict with respect to *B*, as well as with respect to *A*, to tell them that they were not sworn to give a verdict in respect of *B*. In this case the Judge was the same on both trials, but there might have been a different Judge, as well as a different Jury on the second trial.

Exhibit *A* and Exhibit *B* relate to different portions of land. The pottahs were as separate and distinct as two different persons, or as two bonds, one for 100 rupees, and the other for 10,000 rupees. It is stated by my hon'ble colleague that a man may by one act commit several offences—as for instance, where, by the discharge of a missile into a crowd, he kills several persons. It is not necessary for the present case to go to that extent, or to express any opinion upon that point. The forging of two different instruments cannot be effected by a single act, though two men may be killed by one shot. It appears to me to be clear that the forgery of each of the documents constituted a distinct offence, and, if so, the two offences could not be reduced to one offence by the course which the prosecutor thought fit to adopt on the trial for one of them. Whether the prisoner committed one offence or two offences, must be determined with reference to the facts as they existed at the time when the offences are alleged to have been committed. To render a formal acquittal or conviction a defence on a second trial, the offence must, according to Section 55, be the same offence. It would be no answer on a trial for one to say that

the prisoner had been acquitted of another on a trial at which evidence was given respecting both, and which, if believed, would have proved the prisoner guilty of both. The words of Section 55 are, "A person who has been tried for an offence, and convicted or acquitted of such offence, shall not be liable to be tried again for the same offence." The jury were not empanelled or sworn to try the prisoner in respect of *B*, and he was never tried for the offence of forging *B*.

The law here is similar to the law in England and America, and, therefore, it may be as well to refer to some decisions in those countries as throwing light upon the subject now under consideration.

In England it is necessary that the crime charged be precisely the same as that of which the prisoner was acquitted, and so strictly does the rule prevail that it was held by all the Judges that an acquittal upon a trial for burglariously breaking and entering a dwelling-house, and stealing goods therein, was no bar to a subsequent indictment for burglariously breaking and entering the dwelling-house with intent to steal the goods, though both charges related to the same breaking and entering. Mr. Justice Buller, in delivering the opinion of the Judges, remarked that, if the crimes were so distinct that evidence of the one would not support the other, it would be as inconsistent with reason, as it would be repugnant to the rules of law, to say that the offences were so far the same that an acquittal of the one would be a bar to a prosecution for the other. The question in these cases is whether the prisoner could have been convicted on the first trial of the offence charged on the second trial, and whether he was ever in jeopardy for that offence. In *Vaux's Case*, 4 Coke's Reports 44, it was held that, where a former acquittal or conviction is spoken of as a good plea, a lawful acquittal or conviction is intended, and that, if the former indictment was not sufficient, the acquittal or conviction would not be a lawful one. When it is said that the offences must be the same, it is merely meant that they must be in reality the same; and, therefore, a defendant may plead his previous acquittal, though the two charges differ in immaterial circumstances, for it would be absurd to suppose that, by varying the day, place, or any other allegation, the precise accuracy of which is not material, the prosecutor could change the rights of the defendant, and subject him to a second trial for what in reality was the same offence. Thus, if a prisoner be indicted for murder

alleged to have been committed on a certain day and acquitted, and afterwards be charged with killing the same person on a different day, he may plead the former acquittal in bar notwithstanding this difference, for the day stated in the indictment on the former trial was not material. See Chitty's Criminal Law, 1st Volume, page 452, and the cases there cited.

The following are instances of cases in which the offences have been held to be different. It is laid down in Hale's Pleas of the Crown that, if *A* commit a burglary, and at the same time steal goods out of a house, and he be indicted for stealing the goods and acquitted, he may be afterwards indicted for the burglary notwithstanding the acquittal, and *converso*, if indicted for the burglary and acquitted, yet he may be indicted for the larceny, for they are several offences, though committed at the same time, and burglary may be where there is no larceny, and larceny may be where there is no burglary. So, it has happened that a man acquitted for stealing a horse has yet been arraigned and convicted for stealing the saddle, though both were done at the same time. Hale's Pleas of the Crown, Volume 2, page 245.

Wherever the offences charged in the two indictments are capable of being identified as the same offence, it is a question of fact whether the offences are the same, and the identity must be proved; but where a plea of *autrefois acquit* upon its face shews that the offences are legally distinct and incapable of identification, the Court may determine the question as a matter of law. See the case of *King vs. Vandecomb* and another above cited. If a prisoner should be charged with murdering *A*, and should plead a former acquittal, and prove that he had been acquitted upon a charge of murdering *B*, evidence would be admissible to prove that the two charges related to the same person and to the same killing, and it might be shewn that the person referred to in the former indictment by the name of *A* was in fact the same person as the one referred to in the second charge by the name of *B*, for the same person might be known by two different names. But if a person were indicted for murdering *A* by shooting him, and also for murdering *B* by poisoning him, and it should be proved that he killed both *A* and *B*, a former acquittal upon a charge of murdering *A* would be no bar to his trial on the subsequent charge so far as it related to the murder of *B*, even though it should be shewn

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Vol. VII. that, upon the former trial, evidence had been erroneously admitted to prove that he murdered *B* for the purpose of showing that he was a man of a wicked and evil disposition, and that it was, therefore, probable that he murdered *A*. So, upon a charge of forging a bond for 10,000 rupees, I apprehend it would be no answer to show that he had been formerly tried and acquitted of forging a bond for 10 rupees, if it should appear that the former trial related to a bond for 10 rupees, even though it should be proved that the bond for 10,000 rupees, the subject of the second trial, had been adduced in evidence on the former trial for the purpose of shewing that the signature to the bond for 10 rupees, and the signature to the bond for 10,000 rupees, were so exactly alike, and so nearly resembled a genuine signature of the obligor, that they were both probably forged by tracing the signature to each of them over the same genuine signature. It appears to me that it would be wholly inconsistent with justice to hold that the forging of the two bonds was one and the same offence, and that the acquittal as to the bond for 10 rupees was conclusive in favor of the prisoner, for all purposes connected with the administration of the criminal law, that he had not been guilty of any offence as regards the bond for 10,000 rupees.

Suppose *A* should sue *B* in one suit upon two bonds, one for 100 rupees, and the other for 500 rupees, and should afterwards sue him on a bond of later date for a lac of rupees, and *B* should admit that the bond for 100 rupees was genuine, and set up as a defence to the other bonds that they were forgeries; and suppose that, upon the trial in the suit upon the 500 rupees bond, *B* should cause the bond for a lac to be produced for the purpose of showing that both bonds were forgeries, and that the signature to them were so precisely alike, and so similar to the signature on the admitted bond for 100 rupees, that they must have been traced over that bond. Suppose, further, that the bond for 500 rupees should be held to be genuine and not a forgery, and that a decree should be given against *B* for the amount. Could it be contended for a moment that the decree holding the bond for 500 rupees to be genuine would be conclusive in favor of *A* and against *B* that the bond for a lac in the second suit was also genuine and not a forgery, merely because, upon the evidence applicable alike to the bond for 500 rupees and the bond

for a lac, it had been found in a former suit between *A* and *B* that the bond for 500 rupees was genuine and not a forgery. If the decree in the first civil suit, that the bond for 500 rupees was not a forgery, would not be conclusive in the second suit in favor of *A* that the bond for a lac was not a forgery, why should a judgment of acquittal in favor of *A*, upon an indictment for forging the bond for 500 rupees, be conclusive evidence in his favor, upon a subsequent indictment against him for forging the bond for a lac, that he had not forged that bond?

It is contended by my hon'ble colleague, in the present case, that to hold the former acquittal an answer to the charge of forging the second pottah, is not only in accordance with law, but is also in accordance with the true interests of justice, and that it would prevent that which it is most desirable to prevent, *viz.*, conflicting verdicts of Juries upon the same evidence. Would it not be equally desirable, in the case which I have supposed, to hold that the judgment given as to the bond for 500 rupees in the first suit was binding in the second suit upon the bond for a lac, lest upon the same evidence the same Judge should hold the first bond to be genuine, and the second a forgery? Or suppose that, in the case of the two bonds, the bond for 500 rupees should be held to be a forgery, and the suit upon it should be dismissed, would it follow that the suit upon the second bond for a lac ought to be dismissed, lest there should be conflicting judgments by the same Judge upon the same evidence. Suppose, in the present case, pottah *A* had been held genuine in a civil suit, and in a subsequent suit relating to the land in pottah *B*, precisely the same evidence should be given as that which had been adduced in the suit relating to pottah *A*, could it be held that the decision in the first suit would be conclusive in the second suit that pottah *B* was genuine, lest conflicting judgments should be given upon the same evidence by the same Judge?

It appears to me that the forgery of *A* and the forgery of *B* constituted two distinct offences; that the acquittal of the prisoner under the charge of forging *A* was not an acquittal of the same offence as that which formed the subject of the second charge, *viz.*, the forgery of *B*, notwithstanding evidence was given upon the first trial tending to show that both pottahs were forgeries. The truth is that, when a former conviction or acquittal is set up as a bar to a subsequent

trial, the Court, before which the second trial is held, has nothing to do with the evidence given on the former trial, except for the purpose of ascertaining whether the offence which formed the subject of the first trial is the same as that which forms the subject of the second charge. If the offence is the same, the former conviction or acquittal is a bar to the second trial, whether the second Court considers that the former conviction or acquittal was warranted by the evidence given in the first trial or not. If the offence is not the same, the former conviction or acquittal is no bar to the trial upon the second charge, notwithstanding the evidence given in the two cases is the same; and the Court, whether the same as that which tried the prisoner for the first offence, or a different Court, is bound to apply its own judgment to the evidence before it, and to give a verdict according to its own conviction upon the evidence adduced. It appears to me that two distinct offences cannot be converted into one such offence by reason of any evidence which the prosecutor may think fit to adduce upon the trial for one of them.

For instance, upon an indictment for murdering *A*, it would be no answer that the prisoner had been acquitted upon a trial for murdering *B*, unless it could be shown that the two charges related to the same person under different names. If it were shown that *A* and *B* were two different persons, as for instance, that *A* was a man, and that *B* was a woman, no amount of proof as to what evidence was given on the trial for the murder of *A* could show that the offences were one and the same, so as to render the acquittal as to *A* a bar to the charge of murdering *B*.

As to the second point, there is nothing to show that the deposition of the deceased witness was offered in evidence on behalf of the prisoner on the second trial. Suppose it could be proved that the evidence of the deceased witness was false, and that the prisoner knew it to be false, the prisoner could not, in consequence of anything that appears to have been done on the second trial, be convicted under Section 196 of the Penal Code of attempting to use on the second trial the deposition of the deceased witness as true, knowing it to be false. If he had tendered the deposition on the second trial with the knowledge that it was false, he would have been liable to punishment under the Section to which I have referred. The Judge was not bound of his own accord to refer to the

deposition as evidence, merely because it was Vol. VII
annexed to the record which was put in evidence for the purpose of proving a former acquittal. It appears to me that there are no grounds for reversing the conviction, or sending the case back for a new trial, and I am of opinion that the conviction and sentence ought to be affirmed.

Kemp, J.—The appellant, through his pleader, contends that his conviction by the Sessions Judge of the 24-Pergunnahs is illegal, and ought to be set aside under the provisions of Section 55 of the Code of Criminal Procedure.

The said Section is to the following effect: "That a person who has once been tried for an offence, and convicted or acquitted of such offence, shall not be liable to be tried again for the same offence."

In short, the prisoner's plea is "*autrefois acquit*." This plea is grounded on the maxim that no man is to be brought into jeopardy more than once for the same offence.

The prisoner in 1864 was arraigned on an indictment for forging an instrument purporting to be a pottah conveying to him a tenure in perpetuity in a parcel of land, situated in the Orphangunge at Kidderpore. The metes and boundaries of the land were described in this pottah, and the jumma was specified. The date of the pottah with the forgery of which the prisoner was charged was given in the indictment. The prisoner pleaded to a formal and precise charge. A majority of the Jury acquitted him of the offence of forging the pottah, which was clearly identified by the indictment.

In the present trial, which took place in 1866, he is charged with the offence of forging another and quite a distinct pottah for a piece of land which is not identical with the land which was the subject matter of the former charge. He has been found guilty by the unanimous verdict of the Jury, and I am of opinion that the plea of "*autrefois acquit*" is inadmissible, inasmuch as the prisoner has clearly not been brought into jeopardy more than once for the same offence.

The above was the judgment that I proposed delivering in this case. After hearing the case argued before a third learned Judge, I have only to add that I entirely concur in the judgment delivered by the learned Chief Justice.

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The 26th January 1867.

*Present :*The Hon'ble F. B. Kemp and W. Markby,
*Judges.***Disappearance of evidence of a crime.***Queen versus Muddun Mohun Bose, Noimuddee Caze, and Soban Sircar.**Committed by the Magistrate, and tried by the Sessions Judge of Jessore, on a charge of causing evidence to disappear, &c.*

A conviction on a charge of causing the disappearance of evidence of an offence which amounted to culpable homicide not amounting to murder may be good, though there be no proof of who committed the culpable homicide.

Kemp, J. The prisoners have been heard through their learned Counsel, Mr. Jackson.

The Sessions Judge and assessors, after rejecting much of the evidence, and acquitting some of the other prisoners, have come to the same finding, that the prisoners are guilty under Sections 201 and 143.

The arguments used by the learned Counsel are the same as he used when defending the prisoner in the Court below, and they were duly considered by the Sessions Judge, who appears to have exercised much discrimination in his estimate of the weight of the evidence. We cannot, in this case, after hearing the argument of the Counsel, say that we find such discrepancies or improbabilities in the evidence as to induce us to differ from the view taken by a Judge who had the witnesses before him, and by assessors of local experience.

The Sessions Judge, though he found that the evidence was insufficient to shew who killed the man Dokee, finds that a homicide was committed. The prisoners have caused the disappearance of evidence of an offence which amounted to culpable homicide not amounting to murder. The conviction is, therefore, good, though it may not be proved who actually committed the offence.

The appeals are rejected.

The 26th January 1867.

*Present :*The Hon'ble F. B. Kemp and W. Markby,
*Judges.***Misdirection.***Queen versus Shama Khankee and others.**Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of disposing of a minor under**the age of 16, with intent that she should be employed for the purpose of prostitution, &c.*

Where a Sessions Judge left the Jury to decide upon the age of a girl who had been kidnapped, merely aiding them with his own opinion, in which they expressed their concurrence—HELD that there was no misdirection to the Jury.

Kemp, J.—THE vakeel for these prisoners contends that the Sessions Judge should have left to the Jury to find whether the girl who was kidnapped was a minor, that is to say, under 16 years of age, and not to have left them to be guided by the Sessions Judge's impression of the girl's age.

There has been no misdirection to the Jury. The Sessions Judge told the Jury that the first point for their consideration was the age of the girl. He left that question to their unfettered judgment, aiding them with his own opinion, in which it appears they had expressed their concurrence. There is nothing illegal in the proceedings, and the appeal is rejected.

The 26th January 1867.

*Present :*The Hon'ble F. B. Kemp and W. Markby,
*Judges.***Power of Sessions Judge—Verdict of Jury.***(Queen versus Joy Kisto Gossamy.)**Committed by the Deputy Magistrate, and tried by the Sessions Judge of Moorshedabad, on a charge of theft, &c.*

Where a Sessions Judge refused to accept the verdict of the Jury acquitting the prisoner on the first count, and finding him guilty on the second, and required them to find the prisoner guilty on the first count—HELD that the Judge had no power to control the Jury in this manner, but that he should have recorded the finding on the first count as the verdict in the case, and sentenced the prisoner accordingly.

Markby, J.—IN this case the pleader for the prisoner has objected that the evidence was not fairly summed up to the Jury, but we are perfectly satisfied with the fairness of the direction.

It is also objected that the confession before the Deputy Magistrate was improperly admitted; but this objection is, also, in our opinion, ill founded.

Lastly, the pleader objected that the Sessions Judge acted illegally in refusing to accept the verdict of the Jury acquitting

the prisoner on the first count, and finding him guilty on the second, and requiring them to find the prisoner guilty on the first count. We think this objection is well founded. The Sessions Judge has no power to control the Jury in this manner. Having left the several charges to the Jury, it must be presumed that he considered that there was evidence in support of each of those charges, and it was for the Jury alone to acquit or convict the prisoner in the several charges as they thought proper.

The Sessions Judge ought to have recorded the first finding of the Jury, which is the verdict in this case, and sentenced the prisoner accordingly. This Court therefore, directs that the finding of the Jury, that the prisoner was not guilty on the first charge, and guilty on the second, be recorded as the verdict of the Jury, and upon that finding we sentence the prisoner to three years' rigorous imprisonment.

The 26th January 1867.

Present

The Honble J. B. Kemm and W. Markby
Judges

Forged Evidence.

Queen v. Muddoo Soodum Shaw

Committed by the Magistrate and tried by the Sessions Judge of Sylhet on a charge of corruptly attempting to use as genuine fabricated evidence.

Where a prisoner produced as evidence an account book, one page of which had been fraudulently abstracted, and another substituted for it. Held that the prisoner was not guilty of the offence of attempting to use as genuine, fabricated evidence, unless he knew of the forgery, and intended to use the book, &c. for the purpose of affecting the decision on the point at issue when the book was tendered.

Markby, J. In this case the prisoner undoubtedly produced as evidence an account book, one page of which had been abstracted, another being substituted in its place. That this was done in furtherance of some fraudulent design can also scarcely be doubted, considerable pains having been taken to conceal the alteration.

But, notwithstanding this, the prisoner is not guilty of the crime with which he is now charged, unless he knew of the forgery, and intended to use the forged evidence for the purpose of affecting the decision on the

point at issue when the book was tendered. **Vol. VII.** The point upon which the book was tendered was simply whether or no it contained any entry of a certain money transaction. The alteration would, therefore, be immaterial so far as the purpose for which the book was tendered is concerned, unless the original page contained an entry of the transaction in question. But upon an inspection of the subsequent pages of the book, it appears that transactions of an earlier date than that of the transaction in question are there entered, and from the internal evidence of the book, therefore, it would seem that the original page could not have contained any entry of this particular transaction.

Had it been clear that the original page contained an entry of the disputed transaction the Judge would have been justified in inferring that the prisoner was cognizant of the fraud, and intended to use the book as genuine evidence, knowing it to be forged; but as this is not the case, and other persons had access to the book, the prisoner cannot be supposed to have intended to impose upon the Court by using forged evidence, when the only forgery which appears to have taken place had no relation whatever to the purpose for which the false evidence was used.

We therefore think that the conviction is wrong, and that the prisoner ought to be acquitted.

The 28th January 1867.

Present

The Honble J. P. Norman and W. S. Seton-Kerr, *Judges*.

Security to keep the peace—Section 290, Code of Criminal Procedure.

Referred under Section 454, Act XXV. of 1861 and Circular Order No. 18, dated the 15th July 1863.

Diego De Silva versus Jhangoor and others.

When a Magistrate in respect of which further security to keep the peace is required is the same as that before the Magistrate on the first occasion, the case can only be dealt with under Section 290 of the Code of Criminal Procedure.

Norman, J. The Officiating Joint Magistrate appears to have ordered Mr. Diego DeSilva to give a security bond in rupees 500 to keep the peace for a year.

Vol. VII. The Sessions Judge suggests that the order is illegal, because Mr. Diego DeSilva was already under a recognizance to keep the peace for a year, and under Section 289 of the Code of Criminal Procedure, the Magistrate had no power to bind him over for a longer period than one year.

The mode in which the Magistrate has dealt with the case is very unsatisfactory. We cannot make out that he had before him any credible information that Mr. DeSilva was likely to commit a breach of the peace so as to justify proceedings under Section 382.

A charge is brought against certain Mughls, and the Magistrate, dismissing the case, chooses to say that the parties are merely instruments of others in the quarrel between DeSilva and Hoshan Ali. He, therefore, dismisses the case, and orders that DeSilva should show cause why he should not give a security bond of 5,000 rupees.

Whether any summons was issued under Section 283 is not clear. We suppose it was, because the parties seem to have appeared.

On the day of hearing, he merely says that no sufficient cause has been shown, and that neither party has produced witnesses. But there is nothing whatever that we can make out to show that the Magistrate had any jurisdiction to proceed either under the 284th or 282nd Section.

If there was any fresh cause for ordering security, it may be possible that the Magistrate, on that independent complaint, might have had power to take security from the party to keep the peace for a year, though in respect of some former and different, perhaps very trifling, matter, security had been taken from the same party.

Here, however, if there was any ground or justification for the second order of security or even jurisdiction in the Magistrate to make it, which we doubt very much, the matter in respect of which the further security was required was the same as that before the Magistrate on the first occasion, and, therefore, the case could only be dealt with under Section 290.

We quash the order.

The 28th January 1867.

Present:

The Hon'ble F. A. Glover, *Judge*.

Calendar—Object of Column 13.

Queen versus Ajail Aheer and others.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of dacoity.

Column 13 of the Calendar is not meant for the Magistrate's opinion as to the value of the evidence for the defence, but for an abstract of the nature of that evidence, whether to prove *alibi*, character, or any other plea.

The evidence against all the prisoners appears to me sufficient. They were residents of an adjacent village, and were personally well known to all the witnesses. The night, moreover, was moonlight, and there would have been no difficulty in identifying them, more especially as the witnesses and the prisoners were several times close together, and crossed *lattees* more than once.

The assessors acquitted all the prisoners, on the ground that no witness had been able to depose to the actual theft of the barley. But this is not exactly the case. Witness No. 1, the owner, states that he was awake by the noise made by the plunderers, saw that his barley-stacks had been disturbed, and a portion of their contents gone, and saw the prisoners making off with bundles of the grain on their heads. The other witnesses, who came up on hearing the prosecutor's shouts, saw the barley being carried off, and saw likewise that the stacks of grain had been disturbed as though persons had carried off part of them.

Taking the whole of the evidence together, it is sufficient, if believed, to establish the fact on violent presumption that it was the prosecutor's grain which was being carried off by the prisoners.

The appeal must be rejected. The Deputy Magistrate should be informed that column No. 13 of the Calendar is not meant for his opinion as to the value of the prisoners' defence evidence, but for an abstract of the nature of that evidence, whether to prove *alibi*, "character" or any other plea. The Deputy Magistrate, instead of filling up the column with such an abstract, has, under the heading "nature of evidence," recorded his opinion that it is "unworthy of any reliance."

The 2nd February 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Hearsay Evidence.

The Queen *versus* Pittambur Sirdar and
others.

*Committed by the Magistrate, and tried by
the Sessions Judge of Dacca, on a charge
of dacoity, &c.*

The moment a witness commences giving evidence which is inadmissible, e. g., hearsay evidence, he should be stopped by the Court. It is not safe to rely on a subsequent exhortation to the Jury to reject the hearsay evidence, and to decide on the legal evidence alone.

Markby, J.—It is unnecessary to answer the question which the Sessions Judge has put to us in this case. Whether he had the power or not to withdraw the case of any of the prisoners from the consideration of the Jury, he certainly was not bound to do so. As in this case he yielded to the representation of the Jury, and the Jury passed their verdict against all the prisoners, the case now comes before us on appeal in the usual way.

Nor is it necessary to express any opinion upon the point whether or no the conviction of two of the prisoners on the uncorroborated testimony of the wife of another prisoner then under trial is legal, because we are of opinion that there must, in any event, be a fresh trial of all the prisoners.

The Sessions Judge has recorded a mass of evidence which is mere hearsay, and we have no guarantee whatever that this evidence has not been acted upon by the Jury as against all the prisoners.

The moment a witness commences giving evidence which is inadmissible, he should be stopped by the Court. It is not safe to rely on a subsequent exhortation to the Jury to reject the hearsay evidence, and to decide on the legal evidence alone.

In this case it is quite clear that the Jury, in spite of the warning given them, acted on the hearsay evidence.

Moreover, we think the charge to the Jury defective, inasmuch as it is not pointed

out that the witness No. 1, who is the only witness to the identification (which is admitted to be a weak point in the case), was flatly contradicted in that part of his evidence which relates to the finding of the property by the other witness for the prosecution, whereby the credit due to his testimony was generally shaken.

The Sessions Judge, instead of doing this, told the Jury that the identification had been sufficiently proved: a remark which probably led them to give that part of the case very little consideration.

The case will, therefore, go back for a new trial as against all the prisoners before a fresh Jury. The prisoners will remain in custody.

The 3rd February 1867.

Present :

The Hon'ble F. A. Glover, *Judge.*

**Evidence—Summing up by, and opinion of,
Sessions Judge.**

Queen versus Nawab Khan.

*Committed by the Magistrate, and tried by
the Sessions Judge of Bhaugulpore, on
a charge of administering a stupefying
drug with intent to cause hurt and com-
mit theft.*

It is the duty of a Sessions Judge to give a summing up of the evidence as recorded before him, and to state his own reasons for considering a prisoner guilty.

The only direct evidence against the prisoner is the statement of the witness Tajalee; but, as it is strongly corroborated by the circumstances of the case, I think that the conviction is a proper one and should stand.

The prisoner himself admits that Tajalee fell ill whilst in his company, and also that he carried off the clothes and money belonging to Tajalee, which were afterwards found by the Police in Arman's house, where the prisoner had placed them.

His plea that Tajalee requested him to take charge of his property is altogether unsupported, and bears improbability on the face of it.

I see, therefore, no reason to interfere with the Sessions Judge's finding, nor do I feel justified in modifying the sentence (although it is the heaviest allowed by law, and although the offence does not present any particularly bad features), because crimes of this nature are of very frequent occurrence in the Bhaugulpore District, and the public safety requires a severe example.

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Vol. VII. The appeal is therefore rejected.

The Sessions Judge's attention should be called to the fact that it is his duty to give a summing up of the evidence as recorded before himself, and to state his own reasons for considering a prisoner guilty.

In this case he has merely extracted the Magistrate's statement of the case (a statement which depended on the evidence taken by that officer, and which might or might not be a correct one with reference to the depositions recorded at the Sessions), and, on it, has contented himself with remarking that "the case is fully proved against the prisoners."

The 4th February 1867.

Present :

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Recognizances to keep the peace.

Kally Churn Sing *versus* Bunker Singh and others.

Reference from the Sessions Judge of Dinagepore.

A Magistrate cannot bind down parties to keep the peace beyond the term of their first recognizance, without proceeding as prescribed by Section 290 of the Code of Criminal Procedure.

Case.—UNDER Section 434, Code of Criminal Procedure, I have the honor to forward the enclosed papers connected with the proceedings of the Magistrate of Maldah, with the view that orders passed by him may be quashed as illegal.

On the 25th June 1866, the Magistrate recorded an order calling upon two persons, by name Lokenath Roy and Brijololl Roy, to show cause why they should not execute a personal recognizance of 5,000 rupees under Section 380, Code of Criminal Procedure.

The number of the Section has, evidently, either through inadvertence or misconception, been misquoted, as it does not appear that the above-named men were convicted of any offence, and the Magistrate seems to have acted on information obtained through a special enquiry made by the Police according to his own directions.

Hence I presume it was Section 282 that formed the grounds of his proceeding.

This, however, is not the error which forms the subject of this reference; but another and subsequent order passed by the Magistrate, dated the 22nd October 1866,

in which he calls upon the same parties to furnish a further recognizance of 10,000 rupees, with additional security of 2,000 rupees.

On what grounds or proof this order is dictated, does not appear in the record; but any how it is clear the Magistrate had no power to bind down the parties beyond the term of their first recognizance without reference to this Court under Section 290.

As this has not been done, I request this latter order may be annulled, and that he be directed to proceed in accordance with the aforesaid Section, if he considers it necessary for the preservation of the peace that a further recognizance should be taken from the parties.

The judgment of the High Court was delivered by—

Seton-Karr, J.—We concur with the Sessions Judge that the Magistrate has not observed the course prescribed by Section 290 of the Criminal Procedure Code, and we quash the second order passed by the Magistrate for additional recognizances with security besides.

The Magistrate, if he thinks it necessary must proceed under the terms prescribed by the Section quoted.

At the same time, and under any circumstances, we desire that the Magistrate do furnish to this Court, through the Sessions Judge, an explanation of the grounds on proof on which he acted in passing the second order which is hereby annulled.

The 4th February 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Land Disputes—Possession.

Criminal Jurisdiction.

Miscellaneous Case.

Queen versus Mussamut Imam Bandee.

Under Section 318 of the Code of Criminal Procedure, a Magistrate can only try the question of possession without reference to the right of possessor.

Kemp, J.—THE orders of the Magistrate in this case, being wholly without jurisdiction, are quashed.

The charge was one of criminal trespass which the Magistrate dismissed. He then went into the question of title, which was quite beyond his competency to do. Under Section 318, he could only try the question of possession, without reference to the right of possession.

The 4th February 1867.

Present:

The Hon'ble J. P. Norman and W. S.
Seton-Karr, *Judges.*

**Murder—Culpable homicide not amounting to
murder—Grave provocation.**

Queen versus Nokul Nushyo.

*Committed by the Magistrate, and tried by
the Sessions Judge of Dinagapore, on
a charge of murder.*

Where a man suddenly cut off his wife's throat, it was held that, in order to establish that the act was not done under grave provocation so as to bring the case under Exception 1 of Section 300 of the Penal Code, it is not sufficient to state that the deceased ceased abusing the prisoner then, but it is necessary to show what interval elapsed between the time when the deceased ceased to speak, and the instant when the prisoner attacked her.

Norman, J.—The prisoner has been convicted of the murder of his wife, Nuzunbee, and sentenced to death. The case comes before us for a confirmation of the sentence.

It appears from the evidence that, on Saturday, the 22nd of December last, the prisoner and his wife were quarrelling and abusing each other. The deceased was lying down, and the prisoner sitting near her, when the prisoner cut her throat with a knife which he had in his hand.

The deceased had, for about a month prior to her death, carried on an intrigue with one Ali. The prisoner in his defence states that on the day before he had found her sleeping with Ali. The witnesses state that the prisoner had been aware of the intimacy for a week. On the morning of the 22nd, at about 9 o'clock, the prisoner had abused his wife for laughing and joking that day with Ali.

The eye-witness Anbee states that, from the time the deceased and prisoner went into the house till he cut her throat, which was about two *ghurries* (forty minutes), the deceased used provoking language.

She told the prisoner that he was the son of a slave; that she would dishonor his father (using most disgusting language); that she would not remain in his house, but would go to Ali, who, she boasted, was her paramour.

This evidence substantially corresponds with the prisoner's statement before the Magistrate. The prisoner adds: "*She raised my temper, and I killed her.*"

The Judge says: "That the prisoner received a great deal of provocation from the deceased, is doubtless; and, had he on the spur of the moment done some act to cause her death, there might be some ground for presuming he was deprived of self-control. But, from the evidence of witness No. 3, it appears to me to have been accompanied by too much deliberation and design to afford the prisoner the benefit of this plea. According to the testimony of witness No. 3, the deceased had ceased to use the foul and aggravating language. When the prisoner committed the deed, his demeanour was apparently calm, and, before using the knife upon her, he had it in his hand, being engaged in slicing a betel-nut, a piece of which he commenced to eat." He adds: "The sight of the weapon may perhaps have suggested the deed, but this was too long after the impulse to afford reasonable ground for supposing it was uncontrollable."

On looking at the evidence of Anbee as given before the Magistrate, and in her statement-in-chief before the Judge, she says nothing of the interval between the time when the deceased was abusing the prisoner, and the time when he cut her throat. On being questioned by the Judge, she says: "The prisoner appeared to be calm at the time, and not in a passion. Deceased was not abusing the prisoner then; she had ceased a short time previously."

But she does not state what interval elapsed between the time when the deceased ceased to speak, and the instant when the prisoner attacked her. We think it is not safe to act on a statement so general.

Provocation was given by the deceased about the gravest that one human being can offer to another. There is nothing which leads us to suppose that the prisoner acted on anything but this grave provocation. Sudden it was undoubtedly, and such as in the ordinary course of nature might be expected to deprive any man of the power of self-control.

We think that the fatal stroke must be referred to the immediate impulse of such provocation. We find that the act was done while the offender was deprived of the power of self-control by grave and sudden provocation, and, therefore, the case falls within Exception 1 of Section 300 of the Penal Code.

Vol. VII. Under Sections 399 and 405 of the Code of Criminal Procedure, we pronounce that the prisoner is guilty of culpable homicide not amounting to murder, and sentence him to rigorous imprisonment for five years.

The 4th February 1867.

Present :

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Extortion—Criminal charge.

Criminal Jurisdiction.

Miscellaneous Case.

Queen *versus* Mobarruk and others.

The terror of a criminal charge is a fear of injury within the meaning of those words in Section 383 of the Penal Code. Extortion may be equally committed whether the charge threatened is true or false.

Norman, J. THE prisoners, Police-officers, were convicted by the Magistrate, Mr. W. L. F. Robinson, under Section 384 of the Indian Penal Code of extortion.

On appeal the Sessions Judge of Dinapore reversed the conviction on this head of charge, and, acting under the powers supposed to be conferred on him by Section 72, found that the prisoners were guilty, either of taking a gratification other than a legal remuneration in respect of an official act under Section 161, or furnishing false information to the Magistrate under Section 405, contending that the conviction by the Sessions Judge is erroneous, and an order for that purpose was made by Mr. Justice L. S. Jackson.

We think that the conviction, as it originally stood, was perfectly correct.

A charge was made that some cattle had been stolen from one Aheer Mollah. The prisoner Andaroo arrested the persons who had taken them on Monday. He kept them all day, and then made them over on Tuesday to the prisoner Mobarruk, who is the head constable. Mobarruk subsequently offered to let those people go for a consideration, and subsequently accepted 30 rupees cash from them to report the case as one of cattle-trespass.

The Sessions Judge appears to think that the terror of a criminal charge is not a fear of injury within the meaning of these

words in Section 383. But we think it clear that it is so. Sections 388 and 389, falling under the general head of extortion, contain special provisions for extortion and attempted extortion by threats of accusation or charges of offences punishable with death. Extortion may be equally committed whether the charge is true or false. It is clear from the evidence that the prisoner, in the course of the same enquiry as to the missing cattle, committed other entirely separate and distinct offences punishable under Sections 177 and 161, for which they might have been separately punished.

It is not necessary to say whether Section 72 has any application.

The original conviction was right, and the sentence, which has not been disturbed by the Sessions Judge, is a proper one, and therefore, under Section 426, the sentence will stand.

The 4th February 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Criminal Trespass.

Miscellaneous Case.

Queen *versus* Ram Dyal Mundle.

A person who forcibly enters upon property in the possession of another, and erects a building thereon, or does any other act with intent to annoy the person so in possession, is guilty of criminal trespass within the meaning of Section 441 of the Penal Code, without reference to the question in whom the title to the land may ultimately be found.

Markby, J.—In this case it has been contended that the prosecutor was not in possession of the land upon which the criminal trespass was alleged to have been committed; but this is found as a fact by the Court below, and we have no jurisdiction to enquire into the propriety of that finding.

It has also been contended that forcibly and in spite of opposition to enter upon a man's land, and erect a building thereon, is not a criminal trespass within the meaning of Section 441, in a case where the accused claims a legal right to do the act by reason of having a title to the land on which the alleged trespass is committed. But we think it is clear that the Magistrate in such a case should look to the possession only; and

if one person forcibly enters upon property in the possession of another, and there does an act with intent to annoy the person so in possession, he is guilty of the offence specified in Section 441, without reference to the question in whom the title to the land may ultimately be found.

The appeal is, therefore, dismissed, and the prisoners, who are now on bail, will have to undergo the remaining portion of their imprisonment.

The 4th February 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Power of Magistrate—Fines (under Excise Act, XXI. of 1856).

Queen versus Surroop Chunder Dutt.

Committed by the Magistrate, and tried by the Sessions Judge at Patna, on a charge of having possession of contraband opium.

A Magistrate may impose a fine exceeding 1,000 rupees under the Excise Act, XXI. of 1856, Section 22 of the Code of Criminal Procedure notwithstanding.

This appeal was originally heard by L. S. Jackson, J., by whom the following judgment was recorded on the 24th December last :—

I AM doubtful whether, with advertence to the terms of Section 22 of the Code of Criminal Procedure, the Magistrate is authorized, in respect of offences punishable either under the Procedure Code or under any special or local law, to inflict a fine exceeding 1,000 rupees.

I therefore direct that the proceedings be sent for, with a view to this point being determined.

On the receipt of the proceedings, the case was heard by Kemp and Markby, JJ., and the following judgment was then recorded by

Kemp, J.—The only point referred to this Bench by Mr. Justice Jackson is whether the fine imposed by the Magistrate of a sum upwards of rupees 1,000 is or is not beyond his competency.

The offence of which the appellant has been convicted is not an offence mentioned in the schedule annexed to Act XXV. of 1861; consequently, Section 22 of that Act does not apply. The prisoner has been convicted of an offence under a special Excise Act, XXI. of 1856, and the fine of 16 rupees

per seer on the whole quantity of contraband. Vol. VI
opium found in the prisoner's possession without license, although in the aggregate it exceeds rupees 1,000, is not under the last quoted Act illegal.

The offence, therefore, being one not mentioned in the schedule annexed to Act XXV. of 1861, and being punishable by the authority specially mentioned in Act XXI. of 1856, viz., the Magistrate, who in this instance has not exceeded the limit of his competency, we reject the appeal. The merits of the case are not before us.

The 5th February 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Omission to give information to prevent offence.

Queen versus Lahai Mundul and others.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of dacoity.

The refusal of a person to join in a dacoity does not imply a knowledge on his part of the commission of that offence, or render him liable to punishment, under Section 176 of the Penal Code, for intentional omission to give notice or information for the purpose of preventing the commission of an offence.

Kemp, J. We see no reason to question the propriety of the conviction and sentence of the prisoners Lahai, Salul, Ram Lochun, and Jagir. They confessed, and property obtained by the commission of dacoity was found in their possession. The Jury was satisfied that the confessions were voluntary.

The prisoner Jagir Khan, who has been convicted of an offence under Section 176 of the Indian Penal Code, has not appealed; but, as the record is before us, we are competent, as a Court of Revision, to determine any question involving a point of law.

The Sessions Judge's charge to the Jury, with reference to the prisoner Jagir Khan, is to this effect, that prisoner states "that, prior to the dacoity, one evening, when he was out in his field, the prisoner Lahai came and proposed to him to take part in the dacoity, but that he declined to have any-

VII. thing to do with it; so that, although the prisoner and Jagir Khan cannot be convicted of actual participation in the dacoity, he is guilty on his own confession under the third head of the charge."

The third charge is under Section 176, which runs thus: "Whoever, being legally bound to give any notice or to furnish any information on any subject to any public servant as such, intentionally omits to give such notice or to furnish such information in the manner and at the time required by law, shall be punished with simple imprisonment which may extend to one month, or with fine which may extend to five hundred rupees, or both; or if the notice or information required to be given respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

Now, without deciding the question whether the prisoner was legally bound to give information of what was communicated to him by the prisoner Lahai, we are clearly of opinion that, taking the whole of his admission, he cannot be said to have intentionally omitted to give such notice or information for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender. Lahai meets the prisoner casually in the field of the latter; proposes to him to join a dacoity; tempts him with the prospect of a share of the booty. The prisoner prefers a life of honest labor, to use his own words, and refuses to join.

We have not been shown that he, well knowing that a dacoity would take place whether he joined in it or not, intentionally omitted to give information. It may well be that he was under the impression that his refusal to join would deter Sahai from committing the dacoity. The Sessions Judge should have told the Jury to find whether, upon the admissions of the prisoner, a guilty intention to suppress information which was required for the purpose of preventing an offence could be legally inferred. Not having done so, there has been a misdirection to the Jury, and the prisoner has been committed upon what is not legal evidence.

The conviction and sentence passed upon this prisoner must, therefore, be quashed, and he must be immediately released.

The 6th February 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, Judges.

Recognizances to keep the peace.

Reference under Section 434 of the Code of Criminal Procedure.

Queen versus Kristendro Roy.

A statement by a complainant (believed by the Magistrate) that he expected the defendant at any time to make an attempt on his person or property is credible information, within the meaning of Section 282 of the Code of Criminal Procedure, of an intended breach of the peace.

The Magistrate may require the accused to deposit money, in lieu of security, for his good behaviour.

Markby, J.—Two grounds are submitted to us by the Judge for reversing the order of the Magistrate requiring the defendant to enter into a bond to keep the peace, which are as follows:—

1. That the Magistrate had no credible information before him that the defendant was likely to commit a breach of the peace, or to do any act that might probably occasion a breach of the peace.

2. That the Magistrate had no legal authority to compel the defendant to deposit money in lieu of security for his good behaviour.

We are of opinion that the Magistrate's order is not illegal on either of these grounds. The complainant stated in effect that he expected the defendant might at any time make an attempt on his person or property, and the Magistrate in his order states that he believes this deposition to be true. This is credible information within the meaning of Section 282 of the Code of Criminal Procedure.

With regard to the order to deposit the money, we also think it was legal. Under Section 288, the Magistrate may take a bond from the defendant, either with or without security. In this case the Magistrate in the first instance required a bond, with two sureties as security, but insisted that the defendant should himself appear and enter into the security. The defendant, in order to avoid this, offered to deposit rupees 2,000 as security, to which the Magistrate assented, and modified his order accordingly, and subsequently, on the petition of the defendant, he reduced the amount of the deposit to rupees 1,000.

We are unable to see any illegality in such a proceeding. The Sessions Judge states that the appearance of the defendant in person was an unnecessary formality.

But a discretion as to whether or no he shall compel the defendant to appear for this purpose is expressly given to the Magistrate by Section 28; and with the exercise of that discretion we have no power to interfere.

We, therefore, direct the order of the Magistrate to be affirmed.

The 11th February 1867.

Present:

The Hon'ble L. S. Jackson, *Judge*.

Evidence—Corroboration.

Queen versus Bissen Nath and another.

Committed by the Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of dacoity.

It is not competent to a Court of Session to inspect an original report from the office of the Superintendent of Police, and to make it evidence against the prisoners. Statements made otherwise than before the Courts, and Officers specified in Section 31, Act II. of 1855, may be given in corroboration of testimony; but such statements must be regularly proved by the person who received them, or by some one who heard them given.

HAVING read the judgment of the Court of Session, and the petition of the two prisoners who, out of the three convicted in this case, have appealed, I see no reason to suppose that the conviction and sentence was unjust and improper.

The appeal is therefore rejected.

I note, for the guidance of the Sessions Judge in future cases, though it is not important in this case (as there was other and sufficient evidence), that it was not competent for the Court to inspect the "original report from the office of the Superintendent of Police," and to make it evidence against the prisoners.

The cases, in which certified copies of statements previously made are receivable as *prima facie* evidence of such statements having been made, are set out in the latter part of Section 31, Act II. of 1855.

Statements made otherwise than before the Courts and Officers therein specified may be given in corroboration of testimony, but such statements must be regularly proved by the person who received them, or by some one who heard them given.

The 16th February 1867.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges*.

Imprisonment (in default of fine).

Queen versus Srimonto Kotal and another.

Committed by the Magistrate, and tried by the Sessions Judge of East Burdwan, on a charge of dacoity, &c.

Additional imprisonment in default of payment of fine must be rigorous, and not in transportation.

Kemp, J.—This case was tried with a Jury. The petition of appeal raises no point of law; it simply asserts that the prisoners are not guilty, and prays that the record may be sent for, and justice done.

The whole of the evidence was laid before the Jury, and the Sessions Judge's charge appears to me to be a very proper one.

The appeals are rejected. With reference to the sentence passed on Srimonto Kotal, I would observe that the additional punishment of 5 years in lieu of fine is illegal; it must be reduced to 2 years and 6 months. The additional imprisonment, in default of payment of fine, must be rigorous, and not in transportation; with this amendment the appeal is rejected, and the sentence confirmed.

Seton-Karr, J.—I concur as regards Srimonto.

The 16th February 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges*.

Dismissal of Complaint—Obstruction.

Queen versus Bholanath Banerjee.

Reference from the Sessions Court at Jessore.

Where an accused, for having repaired a public road without having previously asked for leave to repair it, was, on simple petition, charged with having obstructed the road, and the complainant never appeared—Held that the Deputy Magistrate ought to have dismissed the complaint.

Case.—UNDER Section 434, Act XXV. of 1861, and Circular Order of the High Court,

Vol. VII. dated 15th July 1863, No. 18, I herewith transmit the record of the case to be laid before the High Court, with the following report :—

One Bholanath Banerjee was reported to the Deputy Magistrate of Khowlneah, Baboo Rashbahary Bose, to have obstructed a public road.

The Deputy Magistrate summoned Bholanath, and also visited the road himself.

The Deputy Magistrate found that Bholanath had been cutting the road with a view to make it more passable than it was before, and the Deputy Magistrate admits that, when the work is completed, and which Bholanath has promised to do, the road will be more useful than formerly; but because Bholanath commenced the work without leave, and because the road, in the unfinished state in which the Deputy Magistrate found it, was impassable, the Deputy Magistrate fined him Rs. 30, commutable to 15 days' imprisonment under Section 283 of the Indian Penal Code.

That Section obviously cannot apply to a case of this kind, as it refers to parties who do acts so as to cause danger, obstruction, or injury to any person in any public way.

Now, what the accused did was to repair a road; work of this kind cannot be performed without some temporary obstruction to traffic; and though the accused perhaps could not claim the right to repair the road, still, when he repaired it for the public benefit, his having failed to ask for leave to repair cannot convert his act into an offence.

I observe that the Deputy Magistrate acted simply on a petition which had been presented to him, and that the complainant never appeared. The Deputy Magistrate therefore, should, on the appearance of the accused, have dismissed the complaint under Section 259 of the Criminal Procedure Code.

As his proceedings then from the very commencement appear to have been illegal, I beg to recommend that they be quashed, and that the fine, if paid, be returned to Bholanath Banerjee.

The judgment of the High Court was delivered by

Kemp, J.—The proceedings of the Deputy Magistrate in this case, which are illegal and certainly ill-advised, are quashed for the reasons given by the Sessions Judge, and the fine, if realized, must be refunded.

The 16th February 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Ferries—Regulation VI. of 1819.

Queen versus Deeyanutoollah.

Reference from the Judge of Rajshahye.

Clause 2, Section 13, Regulation VI., 1819, only applies where there has been an accident. Where the Magistrate thinks that a ferry is improperly kept and is in a dangerous condition, he should proceed under Section 4

Case.—UNDER Section 434 of Act XXV. of 1861, and Circular Order of the High Court No. 18, dated 15th July 1863, I have the honor to transmit the record of this case to be laid before the High Court, with the following report.

2. On the 23rd November last, the Magistrate of Rajshahye directed a Police Inspector of Beaulah to enquire into the condition of the Hudolkatty ferry, which crosses the Ganges above 2 miles above Rampore Beaulah, dividing the high road from the latter place to Berhampore. The Inspector deputed a head constable, Poornc Chunder Soor, to make the enquiry, who reported unfavorably of the farmer's management, and subsequently gave a statement on oath before the Joint Magistrate, Mr. Humphry, in which the former was convicted under Clause 2 of Section 13 of Regulation VI. of 1819, and fined 25 rupees. The Joint Magistrate sums up in the following words : " I find the ijaradar keeps his boats very insufficiently manned; two of the boats in daily use are in a dangerous state and unfit to cross passengers, inasmuch as they leak, and require to be baled out the whole time they are in use. Lastly, there are no sufficient landing-stages; the only really good one is kept half a mile from the water's edge, and is too heavy to be moved." After this follows the sentence passed under the Clause and Section of the Regulation above cited.

3. The law cited by the Joint Magistrate was intended for ferries other than Government ferries, as the preceding Clause of the Section clearly shows, and the penalty is provided only for those cases in which an accident has occurred, and life or property has been endangered, neither of which contingencies happened in the present case. The Joint Magistrate has, therefore, committed an error in law, *first* in applying to the farmer of a Government ferry a law which was passed for private ferries; and, *secondly*, in imposing for a simple omission a penalty, which was provided for accidents arising

out of such omission, and I accordingly recommend that his order be set aside.

4. I have confined myself in this respect to the legal view of the case; but the recorded evidence shows the conviction to be as unsustainable in equity as it is in law, for there is no proof that the boats are insufficiently manned--on the contrary, the only witness for the prosecution who crossed the ferry states that, on each occasion that he crossed, the boat had a crew consisting of a manjee and two grown-up rowers. This witness, moreover, says nothing about the boats being unsafe or leaky, and the other ground mentioned by the Joint Magistrate, *viz.*, neglect to provide a proper landing-stage, is merely a matter of public convenience, but in no way affects the security of the ferry, and is, therefore, not an omission for which a penalty could be imposed under the law cited, supposing that law to be applicable to this case.

The judgment of the High Court was delivered by--

Markby, J.—The Magistrate's order is not legal. Clause 2 of Section 13 of Regulation VI. of 1819 only applies where there has been an *accident*. If the Magistrate thought the ferry improperly kept, and in a dangerous condition, he should have proceeded under Section 4.

The order must be quashed.

The 18th February 1867.

Present :

The Hon'ble W. S. Seton-Karr, *Judge*.

Murder—Capital sentence.

Queen versus Sibnarain Palodhee and another.

Committed by the Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of culpable homicide amounting to murder, &c.

Judges must not shrink from doing their duty, and they are bound to pass a capital sentence in a case of murder when they believe the evidence. **Vol. VII.**

This appeal is out of time, but I have looked at the Judge's decision and at the confessions of the two prisoners by reason of the gravity of the case.

Why the Judge did not pass a capital sentence, at least on the prisoner Sibnarain, I am wholly at a loss to conceive. If he believed this prisoner's detailed confession, and I can see no possible reason why it should not be fully believed, corroborated as it is by all the other facts disclosed in the evidence, a more cold-blooded, deliberate, and cruel murder of a near relative, perpetrated simply owing to a long-standing quarrel as to the division of the inheritance, has rarely formed the subject of a judicial enquiry. And it is a remarkable fact that the prisoner records that he actually undertook a pilgrimage to Juggernath or Pooree on account of the feelings engendered by this quarrel. I can only say, after carefully perusing the confession of Sibnarain, that, had a sentence of death on a man who confessed to having deliberately hired another man for 6 rupees to murder his nephew come up to me for confirmation, I should unhesitatingly have confirmed and sanctioned the same. The doubts as to who actually perpetrated the crime *might* possibly be some reason for not passing a capital sentence on the other prisoner Boydonath, who merely confesses to having abetted the murder after being tempted with offers of money, but it can be no possible reason for not punishing capitally the criminal who confesses that he and no one else conceived and planned so atrocious a crime. Judges must not shrink from doing their duty, however painful it may be, and must pass capital sentences in cases of such extraordinary depravity if they believe the evidence, as the Judge did in this case.

Vol. VII. Of course, the appeals are rejected, and it is difficult to see what the prisoners could have hoped to gain by their appeal.

The 18th February 1867.

Present :

The Hon'ble F. A. Glover and F. B. Kemp,
Judges.

Riot—Right of private defence.

Queen versus Jeolall and others.

Committed by the Magistrate, and tried by the Sessions Judge of Tirhoot, on a charge of being members of an unlawful assembly, and voluntarily causing grievous hurt, &c.

There can be no right of private defence, either on one side or the other, in a case of premeditated riot.

Glover, J.—THE prisoners in this case have been convicted under Sections 149 and 325 of the Penal Code, and sentenced each to four years' rigorous imprisonment.

It appears from the record that the prisoners, who are servants in the indigo factory of Pokhera, went to re-sow a certain field belonging to one Jeebun (also convicted in this case) with indigo; that the owner had on the previous day sown the land with Indian corn; and that, on the attempt of the factory people to re-sow it with indigo, the villagers of Jaffirpooter interfered; that a general fight was the result, in which one man belonging to the factory party and two of the villagers were severely injured.

The Sessions Judge convicted both parties, sentencing the factory people to four years' and the villagers to two years' rigorous imprisonment.

The factory people now appeal, and Mr. Gregory on their behalf contends that, as against Jeolall and Sookram, there is no sufficient evidence, and that Ram Pertaub was merely exercising his right of private defence of property, and should have been held blameless.

With regard to Jeolall and Sookram, I see no sufficient reason for interfering with the conviction. The first prisoner was identified by three witnesses, the last by two.

Jeolall was a person well known to the witnesses; and the objection urged by his Counsel that, had he been present, *all* the witnesses would have noticed him, seems to me a reason for giving more credit than usual to the general evidence; for had the charge as against Jeolall been, as Mr. Gregory hints, altogether false and made with the object of getting rid of an obnoxious factory servant, all the prosecution witnesses would have been careful to name him.

After going over the evidence carefully, and hearing all that has been urged, I see no ground for discrediting it.

Then as to Ram Pertaub. He admits that he was on the spot at the time of the riot, and it is clearly proved that he took part in it.

In such a case there can be no right of private defence, either to one side or the other. Both parties were evidently aware of what was likely to happen, for they both turned out in force, and were armed with deadly weapons. Granting that the factory had a perfect right under their contract to re-sow the land of Jeebun with indigo, it is clear that they transgressed the law by doing so or trying to do so forcibly. There was a Police-station within easy distance, to which they could have applied for assistance if they had a claim to it, and in any case the Civil Courts were open to them to recover damages from Jeebun for a breach of his contract. The factory people who seek to justify their acts under the Clauses of Section 105 of the Penal Code must shew that they applied for the protection of the law, and did what in them lay to procure its intervention.

So far I dismiss the appeal. But, with regard to the sentences imposed, I do not see why the factory servants should be punished so much more severely than the villagers. Originally both were in fault; and, if there be a comparison to be drawn, the villagers who resisted the re-sowing were more to blame than the factory people, and the mere fact that two men chanced to be injured on the part of the village, whilst only one of the factory side was wounded, does not, in my opinion, form any ground for a difference of punishment; and, if a sentence of two years' rigorous imprisonment be sufficient in the one case, it is equally so in the other.

I would reduce the sentences passed on Jeolall, Sookram, and Rampertaub to two years' imprisonment each.

Kemp, J.—I concur.

The 19th February 1867.

Present :

The Hon'ble F. A. Glover, *Judge*.

Dacoity.

Queen versus Kissoree Pater and others.

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of dacoity, &c.

When a body of men attack and plunder a house, the mere fact of the proprietor's family having been able to make their escape a few minutes before the robbers forced an entrance does not take that offence out of the purview of Section 395 of the Penal Code. It is sufficient for the application of the Section that the robbers cause or attempt to cause the fear of instant hurt or of instant wrongful restraint.

THAT all the prisoners joined together in breaking into and afterwards plundering prosecutor Ruspit Nark's house, I hold to be fully proved. The investigation has been very carefully made by the Sessions Judge, and I see no reason to dissent from his finding so far.

But I think he was wrong in not convicting the prisoners of dacoity under Section 395 of the Penal Code.

He considers it proved that a large body of men, nearly 200, forcibly carried off grain, money, clothes, &c., &c., from the prosecutor's house, having previously broken open the door and frightened the family away; but he does not convict of dacoity, because, as the prosecutor and his family had escaped from the house before the robbers entered it, there was no attempt to cause death, hurt, wrongful restraint, or the fear of such injuries, and, therefore, the offence fell under Section 457, house-breaking by night, with the intention (afterwards carried out) of committing theft.

The Assistant Magistrate apparently did not exactly know what was the nature of the offence committed (although in his grounds of commitment he styles it dacoity), and so sent up the prisoners on an alternative charge under Sections 384, 395, and 457.

It appears to me quite clear that, when a body of men attack and plunder a house,

the mere fact of the proprietor's family having been able to make their escape a few minutes before the robbers forced an entrance does not take the offence out of the purview of Section 395. It is sufficient for the application of that Section that the robbers cause or attempt to cause the fear of instant hurt or of instant wrongful restraint, and the fact of the residents of the homestead running away just in time to escape actual maltreatment would be of itself proof that fear of hurt or of wrongful restraint had been caused. It cannot be said that, under the circumstances of this case, the prosecutor and his family had not very reasonable and sufficient grounds for such fear; and, therefore, it seems to me that, although the robbers do not appear to have discovered the place (some forty yards off) from which the prosecutor watched their proceedings, they had already by their violent entry caused him that fear of hurt and wrongful restraint provided for by the Section, and afterwards through the same fear prevented him from returning to his house, and from taking any steps to save his property from spoliation.

I have no doubt that the conviction should have been of dacoity under Section 395, Penal Code.

As, however, the prisoners who have been convicted under Section 457 of house-breaking by night, &c., have been sentenced each to 7 years' transportation, a not inadequate punishment for the graver crime of which I consider them to be guilty, no practical mischief has been done by the Judge's finding. The appeals are rejected.

The 19th February 1867.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges*.

Sections 184 and 185, Code of Criminal Procedure—Claims to attached property of absconding offender.

Queen versus Chumroo Roy.

Reference under Section 434, Code of Criminal Procedure.

Held by the majority of the Court (Seton-Karr, J., dissenting) that Sections 184 and 185 of the Code of

Vol. VII. Criminal Procedure make no provision for any investigation by a Magistrate of the claims of third persons to property which has been attached. The claimants are not barred by the sale, and may bring a suit in the Civil Court against the purchasers to establish their rights.

*Norman, J. (Peacock, C. J., concurring).—*SECTIONS 184 and 185 make no provision for any investigation by a Magistrate of the claims of third persons to property which has been attached. We do not think that there was any error in law committed by the Magistrate. The claimants are not barred by the sale, and may bring a suit in the Civil Court against the purchasers to establish their rights. A Magistrate has no power to order the attachment of any property, unless it belongs to the party absconding, and he should be most careful not to interfere with, or disturb, the possession of third persons. We are not prepared to say that, when claimants have held back for six months, a Magistrate may not be perfectly justified in presuming that the property was not theirs, and leaving them to vindicate any right they might have in a civil suit. He may fairly say that he is not bound to try a question which is *more* properly one for the Civil Court.

There is, therefore, no ground for interference.

Selon-Karr, J.—As I understand the case, the Sessions Judge is quite right in saying that the plea of the objectors Gundun Roy and Sheo Buksh Roy deserved some enquiry at the hands of the Magistrate.

Whether they appeared within six months or not, or whether the law distinctly provides for their case or not, they are objectors or *third parties* who say that their property has been wrongly attached, and who produce witnesses to prove their statement.

The Joint Magistrate, for the simple ends of justice and equity, was, I think, bound to consider this evidence, as well as the Police Report, instead of summarily and hastily rejecting their plea, as he did, and without, as the Sessions Judge remarks, going into the merits.

I would content myself with quashing the order, and directing the Joint Magistrate to pronounce on the force of the appellants' pleas, instead of referring them to the delay and tedium of a civil suit.

The 25th February 1867.

Present :

The Hon'ble F. A. Glover, *Judge*.

Kidnapping.

Queen versus Sookee.

Committed by the Magistrate, and tried by the Sessions Judge of Dinagepore, on a charge of abduction.

Under Section 361 of the Penal Code (kidnapping from lawful guardianship), the consent of a minor is immaterial, nor do force and fraud form elements of the offence.

THE evidence in this case appears to me clearly to disprove the prisoner's statement that the girl Ameerun, who was previously unknown to her, came to her house begging for assistance and protection. On the contrary it is established by what appears to be very respectable evidence, that the girl was seen in company with the prisoner on the road shortly after she was missed, and that the two had frequent converse together on that and on other days.

Under Section 361, the consent of a minor is immaterial, and neither force nor fraud form elements of the offence; and, if it be shown that the prisoner induced Ameerun to leave her brother-in-law's house, it would be no defence that the girl was willing or even anxious to go.

The brother-in-law was, in the absence of Ameerun's husband (a convict in the Rungpore jail), the girl's lawful guardian; and if, in consequence of Sookee's representations, Ameerun left that guardianship, the offence under Section 361 was committed.

Whether there would be sufficient evidence to convict the prisoner under Section 373 of the Penal Code is a point that need not be considered in this appeal: for, although the Sessions Judge is of that opinion, he has only convicted the prisoner under Section 361.

The appeal is rejected.

The 1st March 1867.

Present :

The Hon'ble L. S. Jackson, *Judge.*

Attendance of witnesses (warrant to enforce)
—Section 63, Code of Criminal Procedure—
Fines.

Miscellaneous Criminal Appeal from an order passed by the Officiating Judicial Commissioner of Assam, dated the 24th December 1866, affirming an order passed by the Deputy Commissioner of that District, dated the 8th March 1866.

Abdoor Ruhman, *Petitioner.*

Baboo Sreenath Doss and Bhuggobutty Churn Ghose for Petitioner.

A Magistrate is not bound, under Section 101 of the Code of Criminal Procedure, to enforce the attendance of witnesses by warrant, except upon proof of due service of summons.

The description of fine which it was the object of Section 63 of the same Code to prohibit was a fine which it would be impossible or very difficult for the accused person to pay, or wholly disproportioned to the character of the offence.

Quære. Whether Section 63 has any application to fines inflicted by a Magistrate.

It appears to me that there is no ground for calling for the proceedings in this case.

Two points have been raised by the vakeel for the petitioner, one being that the case has been decided without hearing the witnesses for the defence, the fact being that those witnesses had been summoned and did not attend on the summons, and the vakeel urges that, under Section 191 of the Code of Criminal Procedure, which is made applicable to cases tried under Chapter 14 of the Code by Section 254, it was the duty of the Magistrate to enforce the attendance of the witnesses by warrant. That Section only declares that it shall be lawful for the Magistrate, if any person summoned to give evidence shall neglect or refuse to appear at the time and place appointed by the summons, and no just excuse shall be offered for such neglect or refusal, upon proof of the summons having been duly served, to issue a warrant. It does not appear that proof of the summons having been duly served was given in this case. Nor is it at all clear that it was a case in which the Magistrate was bound to make any such order. But, in addition to that, I find in the decision of the Judicial Commissioner that "the appellant, "it is evident from an application which he "filed * * *, had ample opportunity to pro-

duce his witnesses had he been inclined to do so. His object, however, it would appear, "has been to gain time, and his having "named such persons as the Post Master at "Bogwah, and the head constable there, as "his witnesses, is proof of this."

Under such circumstances, it cannot be stated that there has been any legal error in the omission of the Magistrate to issue a warrant.

The second point is that the fine imposed on the petitioner is, with reference to Section 63 of the Code of Criminal Procedure, excessive.

It is not shown in any way what the income of the petitioner was, or why the fine is excessive. An application on such a ground should be supported by proof of what the income of the petitioner was, and that the fine was altogether disproportioned to that income and oppressive. It cannot be said generally that a fine of 500 rupees, on a person in the position of a tehsildar of a large zemindaree, is a fine of that character. The description of fine which it was the object of that Section to prohibit was a fine which it would be impossible or very difficult for the accused person to pay, or wholly disproportioned to the character of the offence. And to this it may be added that it is doubtful whether the Section cited has any application to fines inflicted by a Magistrate. By its terms it applies only to cases in which the amount of fine is not limited by law. Now, the power of a Magistrate to fine is, in all cases under the Penal and Criminal Procedure Codes, limited to rupees 1,000, and it is only the Court of Session or the High Court that can inflict fines to an unlimited amount.

I see no ground to interfere with the decision of the Court below.

The 6th March 1867.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

False Evidence.

Queen versus Gurjoon Aheer.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of intentionally giving false evidence, &c.

A deliberate mis-statement made in a Court of Justice, whether it tends to endanger the life and property of others, or to defeat and impede the progress of justice, is not an offence which should be lightly passed over. But for a simple mis-statement from which no such

Vol. VII. inferences can be drawn, a comparatively light sentence will suffice, particularly where the prisoner pleads guilty and throws himself on the mercy of the Court.

Selon-Karr, J.—In this case the prisoner has pleaded guilty to a charge of intentionally giving false evidence in a stage of a judicial proceeding, and has been sentenced to three years' rigorous imprisonment.

I think this sentence out of all proportion to the offence disclosed by the record, and admitted by the prisoner himself.

The prisoner was prosecuted, it appears, in a case of theft; and he stated before the Magistrate that he had *never* told the police that he found certain articles produced in Court in the house of one Balak Aheer. To the Magistrate his statement was to the effect that he had tracked the thief, by the grains of *janera* stolen, to the door of the prisoner.

When pressed by the Magistrate, the prisoner said that his false statement was not intentional, and that it was the first time he had ever been in a Court.

The Magistrate does not say that the prisoner intended to get the accused let off, and so to frustrate the ends of justice on the one hand, or that he had instituted a wholly false charge on the other.

The gist of his false statement would seem to be that he made out a less clear and precise case to the Magistrate than had been supposed from his statement to the police.

A deliberate mis-statement made in a Court of Justice, whether it tends to endanger the life and property of others, or to defeat and impede the progress of justice, is not an offence which should be lightly passed over.

But when a person, as in the case before us, makes a simple, though a remarkable, mis-statement from which no such inferences can be drawn, and then literally throws himself on the mercy of the Court, I must hold that, if, for the sake of example, it is thought imperative to commit him, and that if, when committed, he is convicted, a much lighter sentence will suffice.

The prisoner has already been more than three months in Jail under his sentence; and I am of opinion that he should be released as soon as the order to that effect can reach the Lower Court.

Lock, J.—I concur in reducing the sentence as proposed by my colleague.

The 6th March 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby,
Judges.

Right of prisoner—Proceedings of Magistrate (under Section 277, Code of Criminal Procedure).

Queen versus Gunesh Sircar.

Referred under Section 434, Criminal Procedure Code.

When the proceedings of an Assistant Magistrate are submitted to the Magistrate under Section 277 of the Code of Criminal Procedure, the prisoner has a right to be present at the proceedings before the Magistrate under that Section, and to be heard in his defence.

Markby, J.—All the proceedings, subsequent to those before the Assistant Magistrate, Mr. Hopkins, are void, and they must be quashed. The proceedings of the Assistant Magistrate were, we understand, submitted to the Magistrate under Section 277 of the Code of Criminal Procedure, and the prisoner had a right to be present at the proceeding before the Magistrate under that Section and to be heard in his defence, these proceedings being, in fact, a continuation of his trial before the Assistant Magistrate.

The Magistrate will, therefore, take up the case afresh, and adjudicate upon it under Section 277 in the presence of the prisoner.

We also direct that, when the ultimate decision of the Magistrate is given, the record be again submitted to this Court for revision.

The 7th March 1867.

Present :

The Hon'ble F. B. Kemp and L. S. Jackson,
Judges.

Section 435, Code of Criminal Procedure—Power of Sessions Judge to order commitment.

Miscellaneous Criminal Appeal against an order passed by the Sessions Judge of Dacca dated the 12th January 1867.

Huree Chunder Nundee, *am mookteer*, or behalf of Syud Musnud Ali Chowdhr, *alias Moochee Mean. Petitioner.*

Messrs. G. C. Paul and R. E. Twidale for Petitioner.

A Sessions Judge may, under Section 435 of the Code of Criminal Procedure, after a Magistrate has discharged an accused person, order the Magistrate to commit the accused person to the Sessions.

Kemp, J.—This petition must be rejected. The accused person, Moochee Mean, was charged with the offence of affray and riot—

an offence not triable by a Magistrate. The Deputy Magistrate appears to have discharged the offender, Moochee Mean. The Sessions Judge, on a review of the evidence taken in the trial of other prisoners who were implicated in the same offence and were convicted, has directed the apprehension and commitment of the offender, Moochee Mean.

I am of opinion that, under Section 435 of the Code of Criminal Procedure, the Sessions Judge is competent to pass such an order, and I would reject the petition.

Jackson, J.—I am of the same opinion. Section 435 must evidently be construed in connection with Section 225, which permits a Magistrate, when there are not, in his opinion, sufficient grounds to commit the accused person to take his trial, to discharge him. It is then competent to the Sessions Judge, if he thinks fit, to overrule the Magistrate in the exercise of that discretion, and to order that the Magistrate shall commit the accused person to the Sessions.

I wish only to reserve the expression of any opinion upon what I understand to be the Sessions Judge's ground for ordering the commitment in this particular case. It appears that the Sessions Judge, having tried some other persons implicated in the same offence, has looked upon the evidence which was recorded before him at the trial as ground for ordering the commitment of this additional accused person. I should have been inclined to suppose that the authority vested in the Sessions Judge under Section 435 would have been more properly exercised on a review of the evidence recorded before the Magistrate on the preliminary investigation as against the particular accused person whose commitment he thought proper to order. But, as the law is silent as to the circumstances under which the Sessions Judge is competent to order a commitment, and as the point is not raised before us, I do not think it necessary to say anything more on that subject.

I think the application must be refused.

The 11th March 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Misdirection—Acquittal (Judge when to charge for).

Queen versus Greedhary Manjee.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Moorshedabad, on a charge of assembling for the purpose of committing dacoity.

Where there is no evidence against a prisoner, the Judge ought to charge the Jury for an acquittal, and not leave the Jury to say whether the prisoner is guilty or not.

Glover, J.—THE record of this case has been sent up, and from it it appears that, with the exception of Greedhary's statement before the Deputy Magistrate, there was no evidence of any kind against him.

This statement does not go the length of a confession. The prisoner admitted, indeed, that he had accompanied the dacoits for a short distance, but declared that he had turned back almost immediately, and had had nothing to do with the dacoity that afterwards took place, and did not know that such an offence was in contemplation.

If this statement be used against the prisoner, it must be taken in its entirety; and it is no evidence, either direct or presumptive, to prove that Greedhary committed the dacoity.

This being the case, the Jury should have been directed to find a verdict of "not guilty" against this prisoner, and the Sessions Judge was, I consider, wrong in leaving it to the Jury to say whether Greedhary was or was not guilty. There was no evidence against him at all.

I would quash the conviction as being founded on a misdirection to the Jury, and release the prisoner.

Kemp, J.—I quite concur that there has been a misdirection to the Jury in the case of the prisoner Greedhary; his case ought to have been wholly withdrawn from the consideration of the Jury; and the Judge ought to have instructed them in unmistake-

ol. VII. able terms that there was no evidence whatever against this prisoner, and that it was their duty to acquit him.

It is useless to set aside the verdict on the ground of misdirection, and to order that a new trial be had regarding this prisoner, for there is, admittedly, no evidence to go to a Jury. I, therefore, concur in quashing the conviction, and in directing the immediate release of the prisoner.

I observe that the Judge did not concur in the verdict against the prisoner. Had he charged the Jury, pointing out to them that there was no legal evidence against the prisoner, and directed them to acquit, the conviction would not have taken place.

The 11th March 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover.
Judges.

Amends—Theft.

Chootoo Dhoon Bharbhonia *versus* Abdool Meah and others.

Reference under Section 434, Code of Criminal Procedure.

Amends cannot be awarded in a case of theft.

Glover, J.—It has been frequently ruled by this Court that amends cannot be awarded in a case of theft, inasmuch as trials for theft do not come under Chapter XV. of the Procedure Code.

The Deputy Magistrate's order is, therefore, quashed, and the fine, if realized, will be given back to the complainant.

The 11th March 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Contempt of Court—Fugitive offender.

Criminal Jurisdiction.

Queen versus Madhoosurun.

Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

An order striking off a case on account of the little prospect of bringing the guilty parties to trial cannot dispose of the question of contempt of Court arising out of the fact of the accused having absconded to evade justice.

Kemp, J.—We are of opinion that the proceedings of the Assistant Magistrate, Mr. Merington, are strictly legal. The case was not struck off the file, because the accused person, Madhoosurun, had cleared himself of the crime charged, but simply because there then appeared to be little prospect of bringing the guilty parties to trial. Madhoosurun was absconding and evading the warrant of the Magistrate; his property was therefore attached under the provisions of Section 184 of the Code of Criminal Procedure. He did not appear within the time specified in the proclamation of attachment, and an order, declaring the property to be at the disposal of the Government and for its sale after the expiration of six months, was issued. Madhoosurun then thought proper to surrender himself, and he sets up an *alibi*, stating that he was at Muttra, and that he did not abscond or conceal himself for the purpose of evading justice. This plea the Assistant Magistrate found to be not proved, and ordered the sale of the property under Section 185 of the Code of Criminal Procedure. The Sessions Judge is clearly in error in supposing that the order striking off the case disposed of the question of the contempt of Court arising out of the fact of Madhoosurun having absconded to evade justice.

The 11th March 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Sections 307 and 394, Penal Code—Transportation.

Queen versus Bhamour Doosadh.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of attempt to murder.

Neither under Section 307 nor under Section 394 of the Penal Code, can a prisoner be sentenced to 14 years' transportation, the punishment awardable under those Sections being transportation for life, or rigorous imprisonment for 10 years with fine.

Glover, J. It is fully proved that the prisoner attempted to murder the child Meenoo, and would have succeeded in doing so, but for the appearance of the witnesses Nos. 2, 3, and 4. It is also proved that he robbed the child of his ornaments, and we therefore affirm the conviction.

But neither under Section 307, nor Section 394, could the prisoner be sentenced to 14 years' transportation: the punishment that can be awarded under those Sections is transportation for life, or rigorous imprisonment for 10 years with fine. The offence, though comprised under two Sections of the Code, was in reality one and the same, inasmuch as the attempt at murder was committed in furtherance of the robbery.

Had the Sessions Judge sentenced the prisoner to the heavier penalty, we should not have interfered; for the crime was of a particularly brutal character, and only removed from murder by an accident.

It appears, also, that the prisoner is a man of very bad character, and had only shortly before been released from jail after a sentence of 3 years' rigorous imprisonment for robbery.

As a Court of Appeal, this Court must quash the sentence of the Sessions Judge as one not provided by law for the crime of which the prisoner has been found guilty, and, under Section 419 of the Code of Criminal Procedure, pass the legal sentence of 10 years' transportation awarded under Section 59, Penal Code, in lieu of rigorous imprisonment for the same period.

The 11th March 1867.

Present :

The Hon'ble W. S. Seton-Karr, *Judge.*

Confession.

Queen versus Jhurree and another.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of retaining stolen property.

A voluntary and genuine confession is legal and sufficient proof of guilt.

THE confession of Bechoo is conclusive evidence against him if it be believed; it speaks to his having accompanied the dacoits in order to commit a dacoity, and to his having been captured, because he could not run away as fast as the others, who were young men.

I do not quite understand why the Sessions Judge told the jury that the confession was evidence, but was not absolutely conclusive. The question for consideration was, whether the confession was voluntary and genuine; and, if no reasonable doubt arose on these points, the confession was legal and sufficient proof of guilt.

As regards the conviction of Jhurree for retaining the iron-pots knowing them to have been stolen, there does not seem to me to be an absolute deficiency of legal evidence. The case resolved itself into evidence of ownership given by the complainant only, and the assertion of Jhurree on the other hand, unsupported by any evidence.

I do not find that any one but the prosecutor has positively sworn to the iron-pots as those of the prosecutor; but the defence is a failure; and one witness for the prosecution does swear that Jhurree has no iron-pot of his own.

I can discover nothing in the convictions wrong in law, and reject the appeals.

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The 11th March 1867.

*Present :*The Hon'ble F. B. Kemp and F. A. Glover,
*Judges.**Insanity.*Queen *versus* Pursoram Doss.*Committed by the Assistant Magistrate, and tried by the Sessions Judge of Gya, on a charge of culpable homicide amounting to murder.*

Case in which the prisoner, notwithstanding that he had been convicted by the Sessions Judge, was acquitted by the High Court on the ground of insanity under Section 393 of the Code of Criminal Procedure, and directed to be kept in safe custody, pending the orders of the Local Government to be applied for by the Judge.

Glover, J.—THERE can be no reasonable doubt, I think, that the prisoner killed the deceased Hajjam. He was seen walking round the body flourishing a *lattee*, and using abusive and threatening language, by two witnesses, who, although they did not go quite close to him in consequence of his violent manner, were near enough to be certain of their identification, and who depose most positively that the prisoner is the man they saw. These witnesses had, moreover, the advantage of seeing the prisoner again almost immediately afterwards, when they assisted in arresting and taking him to the police station after the attack and robbery of the Chooliharas.

The men, who were attacked by the prisoner, and who eventually, with the help of witnesses Nos. 1 and 2, secured him, corroborate the former evidence to a certain extent, and the state of the prisoner's clothes and hands (covered with blood) is a further corroboration.

It is proved, then, that the prisoner was seen flourishing a *lattee* over a dead body covered with wounds and bleeding, and that his hands and a turban which was twisted round his waist were covered with blood. He was arrested a few minutes later (in the midst of a violent attack upon a party of travellers) in the same condition, and was, after a hard struggle, carried off in custody. I think that this evidence is sufficient to prove that the prisoner was the man who killed the Hajjam, and so far I agree with the Sessions Judge.

The important question remains, what was the prisoner's state of mind when he did so?

The Judge's opinion of the prisoner formed from personal observation was "that the prisoner may not actually be insane,

"still he is eccentric to a degree. He is quite "unable to meet a man's eye, has a wild "and uneasy look, talks rationally enough at "times, and then suddenly changes the point "of his talk without rhyme or reason : at "one moment he is placid, at another violent "and abusive."

The Judge also found that there was no sufficient proof that the prisoner was under the influence of any intoxicating drug when he committed the offence.

He convicted him of the murder, and held (rather inconsistently I think) him to be a responsible agent, although, for reasons not given, he considered a sentence of transportation for life a sufficient punishment.

He has gone very laboriously into this case, and has apparently left no means unemployed to arrive at what was the prisoner's state of mind, but I am constrained to differ from his conclusions.

I may remark in passing that the Judge has somewhat mistaken the purport of the enquiry into the prisoner's sanity, by referring it more particularly to the present state of the prisoner, rather than to what it was at the time the offence was committed. No doubt, the enquiry was necessary on both points ; but the result of it on the former point would only have affected the prisoner's being tried, whilst on the other it would determine judgment after trial. As the whole of the evidence, however, is now before this Court on appeal, the mistake is of no practical importance.

After a careful perusal of that evidence, I am of opinion that the prisoner should have been acquitted on the ground that, at the time the offence was committed, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act charged.

I will consider the evidence of the prosecution-witnesses in order.

And, first, as to the appearance and manner of the prisoner when first seen by the corpse of the murdered man. Rugonath and Cawput, witnesses Nos. 1 and 2 say that he was walking about the body, which was lying on a frequented road through the jungle, *lattee* in hand, gesticulating and using violently abusive language. Witness No. 4, Dhomun, saw a man (who, from the other evidence, must have been the prisoner) sitting up in a tree beneath which a horse was tied, and shouting at the top of his voice "hush, hush." The Chooliharas, witnesses Nos. 6, 7, and 8, depose that

after the prisoner had attacked them, he broke open their *pittara*, took out the *suttoo*, part of which he ate, and part threw away, fixed a pair of earrings which were in the box in his ears, throwing another golden ornament (a *dhuntee*) into the jungle, and behaved otherwise in an extravagant manner. The other two witnesses, who came up on hearing the noise, depose to the same effect: and all add that the prisoner was outrageously abusive and violent, and fought them with his *lattee* for several minutes before he was overpowered.

The Sub-Inspector of Police, witness No. 12, states that, after his arrest, the prisoner was "violent when interfered with, jabbered a good deal to himself, and again was rational at times." He adds that "the prisoner did not appear to have partaken of *hang* or such like drug: he was sometimes in his senses, sometimes out of his senses;" and again, "I put handcuffs on him, as I was afraid he would commit violence;" and again, "he talked on several subjects to the people about him, sometimes in reason, and then he would burst out all of a sudden, and become very violent and uproarious."

This witness also deposed that the prisoner admitted to him his having killed the Hajjam, stating that, as he was sitting up in a tree, the deceased came underneath and grinned at him, on which he descended and killed him with his *lattee*. I allude to this with reference to the man's state of mind only.

This was the evidence as to prisoner's behaviour at the time the crime was committed; and it appears to me inconsistent with any other hypothesis than that the man was, from whatever cause, mad at the time in question. The Civil Surgeon, Dr. Russell, was examined on two several occasions. After he had had considerable opportunity of observing the prisoner, the gist of both depositions is to the effect that he did not consider the prisoner to be of unsound mind at present, but that he might be subject to attacks of mania with lucid intervals. Dr. Russell adds: "I think him eccentric, and he has a haggard and care-worn expression of countenance - in fact, his physiognomy is altogether peculiar."

This evidence shows that, although eccentric, the prisoner is now sane, and was, therefore, properly put on his trial; but it in no way invalidates the evidence detailed above; on the contrary, it rather strengthens it.

Then, with regard to prisoner's state before the occurrence of the murder. Ramjoo Lall deposes that, some days before the prisoner's arrest on the present charge (the precise date is not given, but the time would be under a month), he was running about the village, throwing stones at the boys, and abusing them; that he entered the witness's house, and tried to carry off his little girl, and generally conducted himself strangely.

I may remark here that this witness, as well as the succeeding ones, gave a much more highly-colored account of the petitioner's behaviour to the Assistant Superintendent of Police, who conducted a local enquiry on the subject. They then said plainly that the prisoner was both insane and dangerous. The Judge has noticed the fact, and attributes it to the endeavour of the Police Sub-Inspector to hush the matter up, lest he should be called to account for allowing a dangerous lunatic to go so long at large.

Ram Sohail states that the prisoner at the same time and place entered the village-temple, and flung away all the flowers and offerings, threw stones, and abused people generally.

Jugul Singh deposes to the same effect as regards throwing stones and abuse, and adds that the villagers were much frightened at the prisoner, as he was more violent than on former occasions. This witness further gives his opinion that the prisoner was insane at the time.

Three other witnesses, Ramnath, Choonce, and Beharee, depose much in the same manner. They state that, just before the murder was committed, prisoner behaved in an extraordinary manner, and that they all considered him as "pagul."

Mohaput Singh deposes to the prisoner having come to his house on horse-back (this mention of the horse is corroborative of the evidence of the first three witnesses Nos. 1, 2, and 4, who state that, when they first saw the prisoner in the jungle, he had a horse with him tied to a tree) in February on the day of the murder; that he did not seem mad; but that he behaved oddly, sang a great part of the night, and vociferated considerably at times. This witness adds that he thought the prisoner out of his mind at the time.

The chowkeddar of Korai saw the prisoner the night before the murder. He was singing and talking to himself, but did not do anything particularly out of the way.

Vol. VII. Now, it appears to me impossible on this evidence, which, it must be remembered, was not volunteered, as would have been the case had it been desired to get up a case of insanity in favor of the prisoner, but rather extracted from the witnesses after much difficulty, and a lengthened enquiry, to declare that the prisoner, a wandering fukeer from Central India, was, when he committed this murder, in such a state of mind as to know that what he was doing was wrong and contrary to law.

It seems clear that, before it occurred, Pursoram was considered insane by all who knew or saw him; and that, at the time of the murder itself, his acts were those of a man either insane by the act of God, or who had made himself insane by the use of intoxicating drugs. There is no proof of the latter contention. Indeed, the evidence is against the supposition that the prisoner, when arrested, was under the influence of ganja or any similar drug. That he may be sane now, and that he may hereafter remain so, is probable, but that has nothing to do with the question.

I would acquit the prisoner of the charge of murder, as also of the charge of robbery, of which he has been convicted in another case, that of the Chooliharas adverted to in the course of these remarks, and of which the evidence is put up with this record, on the ground of insanity under Section 393, Code of Criminal Procedure, and would direct that, under Section 394 of the Code, he be kept in safe custody until the orders of the Local Government, which the Sessions Judge should apply for, be obtained regarding him.

Kemp, J. I entirely concur.

The 11th March 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Witness (accused person discharged by Magistrate for want of evidence).

Queen versus Behary Lall Bose.

Committed by the Magistrate, and tried by the Official Sessions Judge of Jessore, on a charge of abetting the fraudulent use as genuine of a forged document.

There is no law or principle which prevents a person who has been suspected and charged with an offence, but discharged by the Magistrate for want of evidence, being afterwards admitted as a witness for the prosecution.

Norman, J.—The prisoner has been convicted on a trial held by the Sessions Judge of Jessore of knowingly using a forged copy of a chittah. The Assessors would have acquitted him.

It was proved that the prisoner obtained the copy of a chittah from the Office of the Collector from the writer thereof, one Greedhur Chowdhry. Chunder Coomar has proved that he examined it before it left the office, and that, when he did so, the words interpolated "Da Dinonath" in one place, and "D Dinonath" in another were not in it.

The prisoner delivered the document to his father Ram Lochun, who gave it to his vakeel for the purpose of filing it in the Moonsiff's Court in a suit by Ram Lochun against Dinonath. The vakeel states that, when he received the copy of the chittah, it had on it the words "Da Dinonath," which were those which made it important as evidence for his client.

The Sessions Judge has acquitted Ram Lochun of the forgery.

The question really is whether there is sufficient evidence that the forgery was committed by Behary Lall, or that the document was used by him knowing it was forged. An inspection of the document shews that, if not actually forged by Greedhur or any of the amlah of the Collector's office, it must at least have been prepared for the purpose of being altered, a space having been left in the copy, which appears not to exist in the original, leaving room for the words "Da Dinonath" to be written in. Behary Lall gives no evidence to shew that, when in his possession, the words "Da Dinonath" were not in it. There appears no reason why he would have applied for a copy of the chittah, unless these words were to be in it; because it does not appear that, without these words, it would have advanced the interest of the plaintiff. The Judge observes that Ram Lochun is a feeble old man, 66 years of age. Behary Lall is his son and heir, and took an active part in managing his suit for him.

The Judge observes, too, that his interest in the suit was as strong or stronger than that of his father.

We think, therefore, that it is pretty clearly shewn that the forgery must have been contrived before the document came into the hands of Ram Lochun. The fact that the prisoner handed the document to his father to give to the vakeel will not avail the prisoner, because he does not attempt to prove

that he handed it over in the same state in which he received it. He, and not the Collectorate amlah, knew what it was he was required to prove before the Moonsiff. He, and not they, had an interest in it, and would derive a benefit from the alteration of the document. We think that the only reasonable inference from the fact is that the document must have been forged while under his control, or at least at his instigation.

Mr. Jackson attempted to argue that the evidence of Greedhur was not admissible, because he had been at one time charged before the Magistrate as an accomplice, and had neither been acquitted nor pardoned.

We think that there is absolutely nothing in the point. There is no law or principle which prevents a person who has been suspected and charged with an offence, but discharged by the Magistrate for want of evidence, being afterwards admitted as a witness for the prosecution. Greedhur would probably have rejected an offer of pardon, for it would have ruined him. He could not have been acquitted, for he was never committed for trial.

The 18th March 1867.

Present:

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges*.

**Witnesses (Examination of Prosecutor's)—
Acquittal of prisoner.**

Queen versus Sivenath Mookopadhia and others.

Referred under Section 434, Act XXI. of 1861, and Circular Order, dated 15th July 1863, No. 18.

A Magistrate cannot decide the case of a prosecutor without examining his witnesses. If, upon such trial, he finds that the prosecutor has no right to bring a criminal charge, he should acquit the prisoner on that ground.

Pundit, J.—We agree with the Sessions Judge in holding that the Magistrate should not have decided the case of the prosecutor without examining his witnesses. The order of the Magistrate must, therefore, be quashed, and he must re-try the case of the prosecutor.

The Magistrate, after he has tried the prosecutor's case properly, may, if he finds that the prosecutor has no right to bring a criminal charge at all, decide so; but in that case the prisoner must be *acquitted* on that ground.

The 18th March 1867.

Present:

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges*.

Irregularity—Sentence against prisoners not present—Disputes about water-rights.

Reference by Mr. W. Ainslie, Sessions Judge of Patna, dated the 25th February 1867.

Queen versus Ramnath and others.

A sentence of imprisonment by the Magistrate was quashed as against those prisoners who were not present, and had not been heard in their defence.

In deciding a dispute as to a right of water, the Magistrate must follow strictly the course pointed out by Chapter XXII. of the Code of Criminal Procedure.

Case. UNDER Section 434 of the Criminal Procedure Code and Circular Order No. 18, dated 15th July 1863, I have the honor to submit the records of the Magistrate's proceedings in the case of Ramnath and others, convicted by Deputy Magistrate Syud Azum Ooddeen Hossein Khan, C. S. I., of the offence of being members of an unlawful assembly.

A charge was preferred by Doolar Mahto against Dusruth Mahto and others of rioting, the cause of the riot being a dispute about water-rights. On behalf of the accused, one of whom appeared in person, and two by mooktear, it was pleaded that they had a right to the use of the water, which the prosecutor alleged that they were unlawfully and forcibly appropriating.

Vol. VII. Five of the persons summoned did not, as far as the record shows, put in an appearance. The Deputy Magistrate recorded the examination of one of the accused only, namely Dusruth, who was in personal attendance. After completing his enquiry, he came to the conclusion that no actual violence had been committed, but that the accused had no right to the use of the water as claimed by them. He does not state specially of what offence he found the accused guilty; but it is clear from the terms of his decision that it was of being members of an unlawful assembly, he sentenced all the parties *summoned to a fine of rupees 10 each*, and in default of payment to a week's imprisonment. The three persons, who were present personally or by agent, paid the fine. The case has been brought before me under Section 434 of the Criminal Procedure Code on two grounds: *firstly*, that the sentence, as against those not present and not put on their defence, is illegal; and, *secondly*, that a finding as to the right of irrigation has been improperly recorded.

On both grounds, I think, the proceedings are open to objection. I called on the Deputy Magistrate to explain how he had sentenced persons unheard, if, as represented by the petitioners, he had actually done so; and why he had passed a sentence of imprisonment against those who were not personally present. As the fine had been paid up by the mooktears of the two persons represented by agent, this latter part of his order has become immaterial in the particular case. In respect of the sentence on persons wholly unrepresented, the Deputy Magistrate has submitted an explanation, which I hold to be insufficient. I have no doubt that he believed that the parties were before him, but there is no evidence that they were so; and it is clear that great laxity must prevail in his office when there is no means of ascertaining from the office-records or the record of the case whether accused persons have attended in answer to a summons or not. I think it must be held that these persons have not attended, and that the sentence as against them is wholly irregular. These persons are named Ramnath, Dana, Rajaram, Pertab, and Munraj. I propose that the sentence on these men should be quashed; and the Deputy Magistrate directed to re-summon them, and take their defence, and pass such legal order as may seem right in completing the case. In respect of the two represented by agent, Ram Lall and Khoobiall, although the nature

of the defence is not recorded, I do not propose any interference. Chapter XV. of the Criminal Procedure Code does not absolutely require that the examination of the accused should be recorded; and it is evident that their defence was substantially that they had a right of user; and that, as to them, there has been a fair and complete hearing, and not a legal order within the Magistrate's competency.

4. On the second objection taken, I think that the petitioners are right in so far as that no proceedings were instituted under Chapter XXV. of the Procedure Code; and as the finding is not that the accused acted in defence of a right or supposed right which was being invaded by the opposite party, but that they assembled in a large party to enforce a right, the offence of being members of an unlawful assembly is altogether independent of the existence or non-existence of the right, the finding as to the right to use the water was unnecessary and irregular in form. I propose that this finding should be absolutely quashed, leaving it to the Magistrate to originate a proceeding under Chapter XXII. in due form, if he considers the same necessary.

The Judgment of the High Court was passed as follows by—

Selon-Karr, J.—We concur with the Sessions Judge.

The administration of the business of his Court seems to have been conducted by the Deputy Magistrate with much laxity. We cannot conclude that the five defendants, whose cases are referred to us, were really present in Court, and we set aside that part of the Deputy Magistrate's order which refers to them. The Deputy Magistrate will summon these parties again, and will take their defence and evidence if proffered. If the parties desire it, they should be afforded an opportunity of cross-examining the witnesses for the prosecution. When the trial has been properly held and completed, the Deputy Magistrate will then pass such orders as may be proper.

We also quash that part of the Court's order which relates to the right of water. If the Court intends to decide this point, it must follow strictly the course pointed out by Chapter XXII. of the Code of Criminal Procedure.

The order relating to three of the defendants, as noticed by the Sessions Judge, will stand good.

The 19th March 1867.

Present :

The Hon'ble W. S. Seton-Karr and
Shumbhoonath Pundit, *Judges.*

Penal Code—Punishment.

Queen versus Hossein Ally.

Criminal Jurisdiction.

*Case revised under Section 405, Code of
Criminal Procedure.*

Where a prisoner, convicted of murder against the opinion of the Assessors, was sentenced to transportation for life, the High Court reduced the sentence to 10 years' rigorous imprisonment, remarking on the severity of the Penal Code and on the necessity of administering it so as to make it apply to the various gradations and degrees of crime in this country.

Seton-Karr, J. This case has been called for by the Judge in the English Department, and has been laid before us under Section 405 as a Court of Revision.

The case has been very fully explained by the Sessions Judge, and the whole of the facts are to be gathered from his judgment.

The Judge has convicted the prisoner of culpable homicide amounting to murder against the opinion of the Assessors, and has sentenced him to transportation for life, giving good reasons for not passing a capital sentence.

The main facts do not really admit of any doubts. It is proved that, on a particular day, the prisoner, who for some time had been sitting in the verandah with the deceased, suddenly, and under the influence of an hallucination as to intrigues on the prisoner's part with his female relatives, jumped up, and cut the deceased across the neck and on the arm with a weapon which the deceased was using at his work.

The wound on the neck was certainly very severe. The weapon used was a *daw*, evidently sharp and somewhat heavy. The provocation was nought; and that death ultimately ensued from the wound in the neck, there can be no doubt, although it seems tolerably clear that the case of the deceased was mismanaged, and that with better treatment he might have lived. I do not, however, think that the Judge is right in saying that the second wound on the arm, a slight one, was evidence of an intention to cause the death of the deceased. No doubt, it is possible fairly to argue that the Judge is strictly and legally right in convicting for the highest offence known to our law.

But, had I been presiding at this trial, and charging a Jury or Assessors, I should have much preferred charging for culpable homi-

cide not amounting to murder, or even for grievous hurt. The evidence, to my thinking, would fairly bear out a conviction under the latter part of Section 304, *viz.*, that the "act was done with the knowledge that it is likely to cause death, but without any intention to cause death," &c.

In this view of the case, as a Court of Revision, we may, under Section 405, satisfy ourselves as to the legality or the propriety of the sentence or order passed, and in this case I am not satisfied on either point. I am of opinion that, in the words of the law quoted (405), "the sentence passed is too severe."

The Penal Code is unquestionably one of great severity, and it should be administered by us, so as to make it apply to the various gradations and degrees of crime in this country. I cannot class the crime of which this prisoner has been found guilty, though a grave one, in the category of those which are the highest of crimes, and to which a punishment only short of death, and to many natives equal in severity to death, is meted out.

I would, therefore, convict this prisoner under the latter part of Section 304, and would sentence him to 10 years' rigorous imprisonment.

Pundit, J. I agree in this order.

The 20th March 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Discharge of accused—Witnesses for the prosecution.

Reference from Hooghly under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Dinonath Gope versus Saroda Mookopadhia and others.

A Magistrate ought not to discharge an accused without taking the evidence of the witnesses for the prosecution named in the petition of complaint.

Kemp, J. THE case is returned with directions that the witnesses for the prosecution be examined, and the case disposed of. The Joint Magistrate was wrong in discharging the accused who were charged under Sections 379 and 447 of the Indian Penal Code, without taking the evidence of the witnesses for the prosecution who were named in the petition of complaint.

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The 25th March 1867.

Present :

The Hon'ble F. B. Kemp and W. S.
Seton-Karr, *Judges*.

Salt (Confiscation and release of).

Criminal Revisional Jurisdiction.

*Revised under Section 404, Code of Criminal
Procedure.*

Queen versus Boidonath and others.

By Section 18, Act VII. of 1864, salt, not being conveyed by the route and to the place prescribed in the rowanna, becomes absolutely confiscated. The power of releasing any such salt is vested in the Board of Revenue under Section 39, and not in the Magistrate.

Selon-Karr, J.—THIS case only comes before us for an expression of our opinion as to the correctness of the law laid down by the Deputy Magistrate and the Sessions Judge in regard to the release of the salt. Our opinion is sought for as a guide for the future, and not with any reference to the release of the salt in this particular instance, which has become final.

We think the views of the Sessions Judge erroneous in law. By Section 18 of Act VII. of 1864, salt, not being conveyed by the route and to the place prescribed in the rowanna, becomes absolutely confiscated.

The other Sections relied on by the Sessions Judge, especially Section 29, we think, refer to salt actually contraband, *i. e.*, unlicensed, and, as we read the Section, it does not apply to this particular kind of salt which was merely confiscated by reason of its wrong destination.

In this view of the case, the power of release is vested in the Board of Revenue by Section 39, and not in the Magistrate.

In future, then, salt seized under similar circumstances must be held, by the fact of seizure, to be confiscated, and the release of any such salt would be a question for the Board of Revenue under Section 39.

A copy of our ruling should go to the Sessions Judge of Chittagong, for communication to his subordinate.

The 25th March 1867.

Present :

The Hon'ble L. S. Jackson and F. A.
Glover, *Judges*.

Dacoity—Section 511 of Penal Code.

Criminal Revisional Jurisdiction.

Queen versus Koonce.

Section 511 of the Penal Code does not apply in a case of dacoity.

Where a prisoner was found guilty of an attempt at dacoity under that Section, and of causing grievous hurt in such attempt under Section 397, and a sentence of 3 years' rigorous imprisonment was passed on him, the finding was amended by striking out "Sections 397 and 511," and substituting "Section 395."

Jackson, J.—THIS case has been called for by the Judge in the English Department, on account of the discrepancy between the finding of the Court of Session and the sentence passed.

The Judge finds the prisoner guilty of an attempt at dacoity under Section 511 of the Indian Penal Code, and of causing grievous hurt in such attempt under Section 397, and passes a sentence of 3 years' rigorous imprisonment.

It is clear that, if the prisoner had been found guilty of committing dacoity and of causing grievous hurt at the time of committing it, or of attempting to commit dacoity being armed with a deadly weapon, it would have been imperative, under Section 397 or Section 398, as the case might be, to pass a sentence of not less than 7 years' imprisonment. The latter finding would apparently have been borne out by the evidence; but the Judge has not arrived at either of those two findings, and consequently the case does not fall within either of the two Sections; but, under the terms of Section 391, Indian Penal Code, the case was one of dacoity, and Section 511 does not apply.

We, therefore, not disturbing the sentence of rigorous imprisonment for three years, direct that the finding be amended by striking out the words "Sections 397 and 511," and substituting the words "Section 395."

The 28th March 1867.

Present :

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Examination of accused—Abetment—Section 114 of Penal Code.

Queen *versus* Mussamut Niruni and Monirooddeen.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of murder.

Before criminalizing a man upon his own statement under examination, it is necessary first to make out the statement has been deliberately made and recorded: that, after being recorded, it has been shown or read to the accused; and that the examination has been attested by the signature of the Magistrate following a certificate to be given under his own hand.

In order to bring a prisoner within Section 114 of the Penal Code, it is necessary first to make out the circumstances which constitute abetment, so that, "if absent," he would have been "liable to be punished as an abettor," and then to show that he was also present when the offence was committed.

Jackson, J.—This is a reference from the Court of Session at Backergunge for confirmation of the sentence of death passed upon Mussamut Niruni and Monirooddeen for murder and abetment, the abettor being present when the murder was committed.

The murdered man was the husband of the female prisoner, who, it appears, had a criminal intrigue with Monirooddeen, and likewise with one Johirooddeen, who also was tried for abetment of the murder, but was acquitted.

The fact of the intrigue between the wife and each of these two men is clearly proved.

It is also proved that, on the evening of the murder after dusk, Niruni was heard to call out, "come quickly;" and some of the neighbours going to the house found her standing by the body of her husband, who was lying dead with a wound in his neck, almost severing the head from the body, and manifestly inflicted with a *bais* (an axe or adze) which was found close at hand bloody; a broken part of one of Niruni's lac bracelets was also found on the spot, and after a first denial she admitted to the neighbours that she had killed her husband, and she afterwards stated that the bracelet had been broken in the act of striking the blow.

Monirooddeen, it appears, is married to the sister of deceased, and used to live in the same dwelling.

One of the witnesses (Budhim) states that, as he went on hearing Niruni's out-cry towards the house of deceased, which is about 100 yards from his own, he saw Moni-

rooddeen running away; that, although it was dark, he knew him by his gait, and asked him where he was going, to which enquiry Monirooddeen answered "home."

The examination of Niruni and that of Monirooddeen before the Magistrate have been accepted as evidence by the Court of Session.

The former states that her husband having come in after a walk, Monirooddeen and Johirooddeen proposed to her to go with them for the purpose of criminal intercourse; that she declined; and that Monirooddeen put the axe in her hand, and on his persuasion, she struck her husband one blow, and he fell to the ground.

Of the latter, the Judge says, "Monirooddeen also confessed before the Magistrate to having been present when the blow was struck, but he denied giving Niruni the axe, saying that Johirooddeen had done so."

Now, the fact is that we find among the papers sent up by the Magistrate something which purports to be the examination of Monirooddeen. The question put to him is, "Do you wish to say anything?" Answer—"I have an intrigue with the wife of Bulai. On Johirooddeen putting the axe into the woman's hand, she struck Bulai a blow with the axe. I was behind the house. I did not tell Johirooddeen to kill (Bulai)."

Then follows a signature in Bengalee purporting to be that of Monirooddeen, and an irregularly-shaped mark or figure in a different ink, which may be the rudiment of a signature by some English Magistrate, and the Joint Magistrate's seal. There is a note in English of the same examination, not signed, but apparently taken by the Joint Magistrate, which varies in some degree from the foregoing.

By Section 366 of the Code of Criminal Procedure, it is enacted that—

"The examination of the accused person before the Magistrate shall be given in evidence at the trial. The attestation of the Magistrate shall be sufficient *prima facie* proof of such examination, and such attestation shall be admitted without proof of the signature to it, unless the Court shall see reason to doubt its genuineness."

What "the examination of the accused person" and "the attestation of the Magistrate" are, may be seen by reference to Section 205, which is very explicit on the subject. It provides that the "examination of the accused, including every ques-

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Vol. VII. "tion put to him, and every answer given by him, should be recorded in full, and shall be shewn or read to him, and he shall be at liberty to explain or add to his answers; and when the whole is made conformable to what he declares is the truth, the examination should be attested by the signature of the Magistrate, who shall certify under his own hand that it was taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person," and special directions in the case of a confessing prisoner are given in the 203rd Section.

We do not think it proper to admit as evidence against the accused an examination which appears to have been recorded with such utter disregard of the forms prescribed by law as that of Monirooddeen in the present case.

This is very far from being a technical objection. It is obviously necessary that, before you can criminate a man upon his own statement under examination, you should be satisfied that such statement has been deliberately made and recorded; that, after being recorded, it has been shown or read to the accused, so that he might be assured that his words have been correctly taken down; and it is proper that these important circumstances should be attested by the signature of the Magistrate following the certificate mentioned in the Section above quoted, which is to be given under his own hand.

The 366th Section indeed provides that the examination of the accused shall be given in evidence at the trial, but this refers to an examination as directed by law, and not to any irregular paper which a Magistrate may substitute for the "examination" in proper form.

This piece of evidence being rejected, we have nothing against Monirooddeen, but

I. The fact of his being one of two persons who had an illicit connexion with the wife of deceased (who was his own wife's brother).

II. The statement of one witness Budai who says that he saw Monirooddeen running away from the spot.

It must be observed that it appears from the evidence of the next witness Dudhin that he and Budai went to the spot at the same time, and that he, Dudhin, went to the house of deceased on hearing the outcry of Niruni which she made about 1 dund or 20 minutes after the witness had heard Balai (the deceased) exclaim "O ma." This,

no doubt, would be on his receiving the blow (only one was struck).

Therefore, if it be granted that this recognition of the prisoner running away on a dark night (it was apparently before the moon had risen) can be depended upon, for it is not stated at what distance the witness saw the person whom he declared to be Monirooddeen, nor was his evidence closely sifted on this point; it only results that Monirooddeen was seen running from the house nearly half an hour after the deceased had received his wound.

The Court of Session has not convicted this prisoner of the murder, but of abetment and being present at the commission of the murder so as to make him liable (under Section 114, Indian Penal Code) to be deemed to have committed the murder. It is clear that, to bring the prisoner within this Section, it is necessary first to make out the circumstances which constitute abetment, so that, "if absent," he would have been "liable to be punished as an abettor," and then to show that he was also present when the offence was committed.

Now, we find no evidence of any fact or facts which would amount to abetment of either kind. The only fact really in evidence against the prisoner would support a case of suspicion, not of the strongest kind, against the prisoner Monirooddeen, that he had himself committed the murder, if we had not the admission of Niruni herself that the deed was her own.

The whole case for the prosecution appears to point to Monirooddeen as a principal offender and not a mere abettor, but he has not been convicted or even charged as such; and whatever may be the inclination of our minds as a matter of private opinion, we cannot now direct the prisoner to be tried on that charge.

It follows, we think, that the conviction in the case of Monirooddeen must be annulled, and that we must acquit him and order his discharge.

As to Niruni, the examination is similarly informal and inadmissible; but, against her, there is other very sufficient evidence; her crime is of the very deepest dye, and absolutely without any circumstance of extenuation.

We are obliged to confirm the sentence of death passed in her case, and to order that it be carried into effect.

We think it unfortunate that the Court of Session should not have noticed the irregularities to which we have adverted in the

proceedings of the Committing Officer, and we desire that a copy of these observations may be sent by the Judge to the Magistrate of the district for communication to the Joint Magistrate, and to such others of his subordinates as the Magistrate may think necessary.

If any failure of justice has taken place in the present instance through the escape of a person really guilty, that will be mainly owing to the want of care evinced by the Joint Magistrate who was entrusted with the preliminary investigation.

It has been a matter of consideration with us whether, under the authority vested in us by Section 400 of the Procedure Code, we should direct additional evidence, such for instance as that of Johirooddeen, who has been acquitted, to be taken as bearing on the guilt of Monirooddeen; but, after mature consideration, we do not think that such a course would now be productive of any advantage, and we make no further order in the matter.

The 1st April 1867.

Present :

The Hon'ble J. P. Norman, *Judge*.

False Evidence—Separate charge.

Queen versus Bhairo Misser and others.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of giving false evidence in a stage of a judicial proceeding.

A conviction for false evidence was upheld in a case where the false statement was to stop the prosecution of certain Brahmins on a charge of riot or dacoity and murder.

The commitment and trial of several persons on separate charges, each man's statement forming a distinct offence, approved.

THE prisoner Bhairo Misser has been tried and convicted before the Sessions Judge of Shahabad, under Section 193 of the Indian Penal Code, on a charge of giving false evidence in a stage of a judicial proceeding.

The false statement was as follows: "I swear that I never mentioned the name of

a single Chowbey before the Police at all. **Vol. VII.** I swear that I never identified Deo or Ram Delawar or Sumpat Chowbey before the Police."

The object of the false statement, as appears from the finding of the Sessions Judge, was to stop the prosecution of the Chowbeys, who are Brahmins, on a charge of riot or dacoity and murder. The prisoner has been sentenced to three years' rigorous imprisonment and a fine of 50 rupees. The conviction appears quite correct, and I see no reason to interfere with the sentence.

I dismiss the appeal. The cases of Sewburn Misser, Chain Misser, Mohabeer Misser, and Jani Dholbee, are, in all respects, similar to that of Bhairo Misser.

The prisoners were properly committed by the Magistrate on separate charges, each man's false statement forming a distinct and separate offence. They were tried all together, a course which was in this case probably convenient, and by which I do not see that they have been, in any manner, prejudiced.

I dismiss their appeals.

The 5th April 1867.

Present :

The Hon'ble F. A. Glover, *Judge*.

Cheating—False personation—Abetment.

Queen versus Dhunput Ojhab.

Committed by the Magistrate, and tried by the Sessions Judge of Sarun, on a charge of abetting false personation.

Where a person represented a girl to be the daughter of one woman when she was within his knowledge the daughter of another woman—HELD that he was guilty of cheating by personation under Section 416 of the Penal Code, and that it was unnecessary to bring in Section 109 relating to abetment.

THE evidence is perfectly clear against the present appellant that he represented the girl to be the daughter of Sona and of good family, she being all the time and within his knowledge the daughter of another woman.

ol. VII. He was therefore guilty of cheating by personation under Section 416, Penal Code, and it was unnecessary to bring in the Section (109) of abetment. The prisoner took an active part in the cheating. I see no reason to interfere with the Sessions Judge's conviction and sentence, and dismiss the appeal.

The 6th April 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Section 201, Penal Code—Disappearance of evidence.

Criminal Revisional Jurisdiction.

Queen versus Ramsoonder Shootar.

Section 201 of the Penal Code refers to prisoners other than the actual criminals who, by their causing evidence to disappear, assist the principals to escape the consequences of their offences. But the person who commits an offence, and afterwards conceals the evidence of it, cannot be punished on both heads of the charge.

Glover, J.—This case was sent for by the Judge in the English Department, with a view to ascertaining whether the Sessions Judge's conviction of the prisoner, Ramsoonder, on the second count was legal.

The case proved against the prisoner was that he had pushed one Dhamala, an elderly woman, and that she had fallen into a boat and died then and there, and that he had afterwards set the boat with the corpse afloat down the river, and had so concealed the evidence of his offence.

He was convicted by the Sessions Judge of hurt, and of concealing evidence of the commission of that offence under Section 201, Penal Code.

The conviction under Section 201 we hold to be illegal. That Section refers to prisoners other than the actual criminals who, by their causing evidence to disappear, assist the principals to escape the consequences of their offences. But the person who commits an offence, and afterwards conceals the evidence of it, cannot be punished on both heads of the charge according to the terms of the Penal Code.

So much of the Sessions Judge's order is, therefore, annulled, and the sentence of three months' rigorous imprisonment awarded on the second count remitted.

The 6th April 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Jurisdiction—Section 509, Penal Code—Indecent gestures.

Reference by Mr. W. H. Doyly, Officiating Magistrate of Bhaugulpore, dated the 25th March 1867.

Mussamut Kulree versus Jhoonoo.

Offences coming under Section 509 of the Penal Code are triable by the Magistrate of the District only.

Case.—COMPLAINANT charges accused with having made indecent gestures to insult her modesty on her asking him for rent.

The Lower Court sentenced accused under Section 509, Indian Penal Code, to a fine of 5 rupees.

I think the order of the Lower Court should be reversed, because it is illegal. The Assistant Magistrate who tried the case had no jurisdiction, offences under Section 509 being only triable by a Magistrate of the District or Officer exercising powers of a Magistrate of District.

The Judgment of the High Court was delivered by—

Glover, J.—Under the circumstances stated by the Officiating Magistrate, the Court annul the conviction of Jhoonoo as having been passed without jurisdiction by the Assistant Magistrate.

The offence which came under Section 509 of the Indian Penal Code was triable by the Magistrate of the District only, and the Assistant Magistrate had no authority to entertain it.

The fine, if paid, will be returned to Jhoonoo.

The 6th April 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Abetment—Excise Act, XXI. of 1856.

Queen versus Kullimooddeen.

Committed by the Magistrate, and tried by the Sessions Judge of 24-Pergunnahs, on a charge of illegal abetment of the illicit sale of liquor.

The Excise Act, XXI. of 1856, contains no provision for the punishment of abetment.

Glover, J.—We think that the view taken by the Magistrate of the 24-Pergunnahs is correct.

The prisoner Kullimooddeen has been convicted of the illegal abetment of the illicit sale of liquor to an European soldier, and has been sentenced to pay a fine of 50 rupees, in default of payment to be imprisoned for three months in the Civil Jail. The special law under which the prisoner has been convicted, Act XXI. of 1856, contains no provision for the punishment of abetment.

The offence not being punishable under the Penal Code, it cannot be brought under the provisions of Section 109 of that Code, for Section 40 enacts that an offence denotes a thing made punishable by the Code, and this definition has not been enlarged *quoad* this offence by Act IV. of 1867.

We quash the conviction as illegal, and direct the refund of the fine, if paid, or the discharge of the prisoner, if it has not been paid, as the case may be.

We would observe, for the information of the Sessions Judge, that, in punishing offences committed after the Penal Code came into operation, he is bound to administer its provisions, and not those of former Regulations, and that, in this instance, the case is governed by a special law which, as observed above, does not provide for the offence of abetment of any breach of it.

The 6th April 1867.

Present :

The Hon'ble F. A. Glover, *Judge.*

Accused persons (Mode of designating).

Queen versus Bidadhur Biswas and others.

Committed by the Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of dacoity.

A Sessions Judge should designate accused persons by name, and not by number.

I HAVE had the greatest difficulty in coming to a proper understanding of this case in consequence of the arbitrary way in which the numbers attached to each prisoner in the Calendar have been changed, and of the plan adopted by the Sessions Judge of distinguishing each prisoner by his number, and not by his name.

When there is no confusion of numbers, this plan may do very well, though, in all cases, I prefer the identification of prisoners by their names; but here the numbers in the Calendar do not correspond with the numbers in the Judge's decision; and, no names being given, it is with great difficulty that I have been able to reconcile the two. The evidence in this case has been taken under Section 369 of the Code of Criminal Procedure, all the witnesses, strange to say, having died in the interval between committal and trial.

The prisoners Nos. 2, 3, 4, and 7, of the Judge's decision, but Nos. 2, 3, 4, and 5 of the Calendar, *viz.*, Bidiadhur, Sheekur, Ram, and Oodhub, have been identified by several witnesses, whose evidence has been corroborated by the finding of various articles of stolen property in the prisoners' houses. The prisoner No. 2 was identified by independent evidence, and he appears to have been the ringleader; the other witnesses were approvers to whom a conditional pardon had been tendered.

I see no reason, on the whole, to distrust this evidence, which satisfied the Judge and the Assessors, and which has not been rebutted in any way.

I, therefore, reject the appeal of these prisoners. Prisoners Nos. 8, 9, 10, 11, 12 and 15 of the Calendar, corresponding with

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Id. VII. and of cheating by personation (Sections 415 and 416) and of abetment of the same. I think that, in the words of the law (Section 416), they represented, or aided in representing, that the girls were persons other than they really were, and the prisoners have really pleaded to all the facts necessary to constitute offences under Sections 415 and 416. I do not think the immorality of their acts was that contemplated by Section 373.

In this view I would, under Section 426 of the Criminal Procedure Code, substitute a conviction under Sections 415 and 416 and 419 and under Section 109, for the sentences passed under Sections 373 and 109, and, as a necessary consequence, reduce the sentences of prisoners Nos. 1 and 3 to three years' rigorous imprisonment, which is the maximum that can be awarded under Section 419. The sentences of the others may stand.

Kemp, J.—The facts of this case have been most correctly stated by my learned colleague. It appears to me very clear that, on the evidence, the prisoners cannot be convicted under Section 373 of the Indian Penal Code. The two girls, though bought, were not purchased with the "intent" that they were to be employed or used for the purpose of prostitution, or for any unlawful and immoral purpose. They were bought on speculation, taken to a foreign and distant district, palmed off as women of a much higher caste than they really were, and married to two Rajpoots, after receiving the usual "pon" or bonus. The two Rajpoots, who married the two girls, on the faith that they were marrying women of their own caste and status, were fraudulently and dishonestly induced by deception to do a thing (that is to say, to marry women of a caste wholly prohibited to them) which, but for the deception practised upon them by the prisoners, they would have omitted to do.

The act was one clearly likely to cause damage to the reputation of the two Rajpoots, and comes under the description of cheating by personation, Sections 418 and 419—see also the explanation of Section 415, *viz.*, "the dishonest concealment of a fact is a deception within the meaning of this Section."

The sentences proposed by Mr. Justice Seton-Karr have my entire concurrence.

The 8th April 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Evidence—Statement of prisoner overheard by Policeman.

Criminal Jurisdiction.

*Referred under Circular Order No. 17,
dated the 17th June 1863.*

Queen versus Sageena and another.

The evidence of a policeman who overheard a prisoner's statement made in another room, and in ignorance of the policeman's vicinity, and uninfluenced by it, is not legally inadmissible.

Glover, J.—We do not think that the Police Officer's statement is inadmissible as evidence, although under the circumstances we should probably have attached little or no weight to it.

The woman's statement was not a confession made to a Police Officer under Section 148, Code of Criminal Procedure, nor a confession made to others whilst in the custody of a Police Officer, as provided for in Section 149 of the same Code.

The policeman, overhearing the women's conversation, appears to us to be in the position of an ordinary witness, and competent to depose to what he heard; the women at the time being in another room, ignorant of the policeman's vicinity, and uninfluenced by it.

The 8th April 1867.

Present:

The Hon'ble J. P. Norman, *Judge.*

Kidnapping.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of kidnapping a girl.

Queen versus Isree Panday and others.

Where a girl of 11 years of age was taken out of the custody of her lawful guardian by the first prisoner and offered for sale in marriage to another, and the second prisoner illegally concealed her, the conviction of the former was upheld under Section 363 of the Penal Code only, and of the latter under Section 368 only, while the separate conviction of both under Section 366 was quashed.

The first prisoner has been convicted of kidnapping a girl, named Deodatea, a Rajputni, aged 11 years, by taking her out of the custody of her lawful guardian, *viz.*, her mother.

The facts as proved by the clearest evidence are simply these: The prisoner is a Brahmin, whom the child knew well, as she

was in the constant habit of going to his house to see his wife. In June last he asked the child to go with him to pick his mangoes. She went. He then told her that, if she would go and see the tazzia, he would give her some rice and pice. She refused. He took her by the hand, and led her away to Jugdespore, to the house of Bissessur Tewary (since dead). He said I have brought this girl for your son. He agreed to sell her for 20 rupees. Bissessur paid 5 rupees, and agreed to pay the remainder in 15 or 16 days. The intention was to marry the girl to the son of Bissessur. The girl remained two days at the house of Bissessur. She says that, as she cried, Bissessur said he would cause her to be taken home. Bissessur then took her to the house of the second prisoner, who is said to be a relative of Bissessur. There she remained a month. The second prisoner then took her to the house of a female relative of his own, where she stayed 4 or 5 days, and thence from one place to another, till she was found by the police in a house in Sherepore, in Ghazeepore, about the 5th of September.

The Judge says he convicts the first prisoner of an offence under Sections 363 and 366. As only one offence has been committed, the conviction should have taken place under one Section only.

There appears to me to have been evidence to justify a conviction of the first prisoner under either Section. The sentence is four years' imprisonment. I think that the conviction may stand as a conviction under Section 363, and be quashed so far as it is a conviction under Section 366.

I have read the petition of appeal, and gone through the evidence as to the second prisoner. For reasons similar to those mentioned as to the other, the conviction must stand as a conviction under Section 368.

The appeal is dismissed.

The 15th April 1867.

Present :

The Hon'ble W. S. Seton-Karr and W. Markby, *Judges.*

Theft—Claim of right.

Referred under Section 434, Code of Criminal Procedure, and Circular Order No. 18, dated 15th July 1863.

Queen versus Ram Churn Singh.

A person acting under a claim of right (however ill-founded such claim may be) is not guilty of theft by asserting it.

Markby, J. In this case it is quite clear that the Deputy Magistrate has taken a wrong view of the law. Assuming the account of the complainant and his witnesses to be correct, and that the property in the 23 maunds of cotton had completely passed to the complainant, so that he had a right to place it in his cart and remove it, still the circumstances of the case conclusively shew that the defendant, in re-taking possession of the cotton, did not intend to take it dishonestly within the meaning of Section 378. He was clearly acting under a claim of right, and, however ill-founded that claim might be, still the defendant is not guilty of the crime of theft by asserting it. The conviction is, therefore, quashed, and the fine, if paid, must be returned to the defendant.

The 15th April 1867.

Present :

The Hon'ble W. S. Seton-Karr and W. Markby, *Judges.*

Theft—Security.

Referred under Section 434, Criminal Procedure Code, and Circular Order No. 18, dated 15th July 1863.

Queen versus Kuncce Sonar.

No security can be legally demanded from persons convicted of theft.

Markby, J.—We concur with the Judicial Commissioner. Section 295, Code of Criminal Procedure, does not apply to the case of pri-

Vol. VII. soners who have been convicted and punished for theft, and who cannot, therefore, be said to be "lurking within the Magistrate's jurisdiction." Section 280, which does empower Magistrates to take penal recognizance after conviction from accused parties, refers to a totally different class of cases, *i. e.*, breaches of the peace.

There is, therefore, no Section which authorizes the demand of security from persons convicted of the crime of which the persons, who are the subject of reference, have been convicted.

The order for security is quashed.

The 18th April 1867.

Present :

The Hon'ble F. A. Glover, *Judge*.

Unlawful assembly.

Queen *versus* Dushruth Roy, No. 1. and others.

Committed by the Magistrate, and tried by the Sessions Judge of Sarun, on a charge of being members of an unlawful assembly in the prosecution of the common object for which grievous hurt was committed.

Where persons join an unlawful assembly for the purpose of committing an assault, and, instead of preventing those armed from using their weapons, encourage them to do so, they are in the same position as those members of the unlawful assembly who struck the blows.

THE evidence in this case proves that all the prisoners were present at the attack made upon Ram Nehora Panday and Priteeora; and, considering that all the prisoners went together, were all armed, and all had the same reasons for disliking the new landholder's servants, I think it may be fairly presumed that their common object in going was to assault those persons. That the prisoners Nos. 3 to 6, who do not appear to have taken any active part in the attack, are less culpable than the prisoners Nos. 1 and 2, is true; but they accompanied these prisoners seeing that they were armed with swords, and, so far from attempting to prevent the use of these weapons, they appear to

have encouraged it by shouting "maro." They came, therefore, under Section 149 of the Penal Code, and, knowing that an offence was likely to be committed, they, as members of the illegal assembly, were in the same position as those members of it who struck the actual blows.

I see no reason to interfere. The Sessions Judge has, I observe, very properly awarded a less measure of punishment to the prisoners Nos. 3, 4, 5, and 6 than to prisoners Nos. 1 and 2.

The 27th April 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Contempt—Absconded witness—Service of Summons.

Miscellaneous Case.

Queen *versus* Hurynath Chowdry.

The proclamation issuable under Section 159, Act VIII. of 1859, cannot be legally affixed to the *mal* cutcherry of a defaulting witness. Before the provisions of that Section can come into play, personal service of summons must be attempted. In the absence of process of legal service, the Magistrate's order of imprisonment for contempt, under Section 174 of the Penal Code and Section 168 of the Code of Criminal Procedure, was quashed.

Glover, J.—We are of opinion that there was no legal service in this case; and we think also that the question as to whether there had been or not a sufficient service on the appellant was a question of law which the Judge should have taken up and disposed of.

There is no proof whatever on the record that any attempt was made to serve summonses personally as required by Sections 155 and 156 of the Civil Procedure Code; and, before the provisions of Section 159 of the same Code could come into play, personal service must have been attempted.

But, even were it shown that an unsuccessful attempt had been made to carry out Sections 155 and 156, it is clear to us that the proclamation issuable under Section 159 could not have been legally affixed to the "*mal*" cutcherry of a defaulting witness, a place used for making temporary collections of rent, and abandoned as soon as the collection season was over.

The appellant's house was in the District of Furreedpore, and there was no proof that he was, at the time of the issue of proclamation, residing at his mal cutcherry.

We think, therefore, that, as there was no legal service on the appellant by the Civil Court, the charge made in accordance with the provisions of Section 168 of the Criminal Procedure Code, and punishable under Section 174 of the Penal Code, could not be sustained, and that the Magistrate's order, condemning the appellant to one month's imprisonment for contempt, should be quashed.

The 27th April 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Nuisances—Recognizances.

Referred under Section 434, Act XXV of 1861, and Circular Order No. 18, dated the 15th July 1863.

Queen versus Mahomed Afzul and another.

A Magistrate ought not to direct a party to restore a road and canal to their former state, and to show cause why he should not enter into recognizance to keep the peace, without hearing such party.

Kemp, J.—It does not appear under what Section of the Code of Criminal Procedure the Magistrate proceeded in this case. He has left the district, and his successor now suggests that the order was passed under Section 63. If that be the case, the Magistrate was doubtless competent to enjoin any person not to repeat or continue a public nuisance; and the cutting of a public road, and obstructing the channel of a navigable and public canal, are acts which would come under the definition of public nuisances. The informality in the proceedings of the Magistrate consists in his having directed the opposite party to restore the road and canal in their former state within 24 hours, and to show cause why they should not enter into recognizances to keep the peace, without hearing that party, either in person, or by duly constituted attorney.

The papers are, therefore, returned with directions to the Magistrate to proceed legally and in due form.

The 27th April 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

False Charge—False Evidence.

Committed by the Magistrate, and tried by the Sessions Judge of Purneah, on a charge of intentionally giving false evidence.

Queen versus Abdool Azceez.

The offence of making a false charge, and the offence of intentionally giving false evidence, are not cognate offences, or parts of the same offence, but may be punished separately.

Kemp, J.—The prisoner has been convicted under Sections 211 and 193 of the Indian Penal Code, and has been sentenced under both charges to six months' rigorous imprisonment on each charge.

It is contended, first, that, under Section 71, Penal Code, the prisoner can only be convicted of one offence, and that the punishment being cumulative, the sentence must be modified. The pleader has also addressed the Court, commenting upon the evidence as not sufficient to establish the guilt of the prisoner.

The offence of making a false charge, and the offence of intentionally giving false evidence in any stage of a judicial proceeding, are not cognate offences, nor are they parts of one and the same offence.

The Section quoted by the pleader does not apply, and the conviction is legal. The evidence is, in our opinion, sufficient for conviction, and the appeal is rejected.

The 29th April 1867.

Present :

The Hon'ble W. S. Seton-Karr, *Judge.*

Adultery—Admission.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of adultery.

Queen versus Kallychurn Potial.

Case of a person convicted of adultery on his own admission coupled with the evidence.

As the offence of which the prisoner has been convicted is adultery, there would be an appeal even on the facts and merits of the case, which has been tried by a Jury.

It seems to me that the defendant must be convicted on his own admission coupled with the evidence. He admitted to the Magistrate that he went off with Chundra

ol. VII. Khola, though he says that she enticed him away; and he then further admitted that they were more than a month together in various places.

This admission, coupled with the evidence of the witnesses to the effect that the two lived together as man and wife, leads to the inevitable presumption that acts of adultery must have been committed. It is true that the woman Chundra Khola does not say as much in the Sessions as she had said before the Magistrate; but she admits going off with the prisoner; and other witnesses prove cohabitation as man and wife under feigned names for a considerable period. The defence in the Sessions is a simple denial of the abduction.

The case is aggravated by the relationship between the prisoner and the complainant. I shall not interfere.

The appeal is rejected.

The 29th April 1867.

Present :

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges*.

**Sections 148, 149, and 324, Penal Code—
Rioting—Unlawful assembly—Hurt.**

Miscellaneous Case.

Queen versus Callachand and others.

The offence of rioting armed with deadly weapons and stabbing a person on whose premises the riot takes place are distinct offences, and punishable as separate offences under Sections 148, 149, and 324 of the Penal Code, Section 149 being read as a proviso to Section 148.

Norman, J.—We are of opinion that the offence of rioting armed with deadly weapons, and stabbing a person on whose premises the riot takes place, are distinct offences, and punishable as separate offences under Sections 148, 149, and 324.

The 149th Section may, with reference to such a case as the present, be read as if it came by way of proviso after Section 148.

There is no ground for interference with the sentence of the Magistrate.

The 29th April 1867.

Present :

The Hon'ble W. S. Seton-Karr, *Judge*.

Murder—Proof of motive or previous ill-will.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of culpable homicide not amounting to murder.

Queen versus Jaichand Mundle and others.

Proof of motive or previous ill-will is not necessary to sustain a conviction for murder in a case where a person is coolly and barbarously put to death.

This is a peculiar case, because no motive is proved for the murder of Bishonath by the three prisoners, though one was just hinted at in the course of the trial.

The Sessions Judge was quite right in telling the Jury that the case really turned on the credit to be given to the evidence of the two witnesses, Hari and Bechoo. If the Jury believed that evidence, coupled with the evidence that the deceased was last seen alive in the company of Ram Coomar, there was sufficient to warrant a verdict of guilty.

But I do not understand why the Sessions Judge told the Jury that the mere want or failure of proved ill-will at once disposed of the higher charge of murder, or why the Jury found on the lesser charge, and acquitted of the heaviest offence known to the law. Granting that no motive was proved, the murder was deliberately perpetrated by three men on one defenceless person, the murderers beating and strangling him, and then carrying away the body to a deep river, in which they carefully sunk it with a weight attached to it.

The Sessions Judge should have told the Jury that, if they believed the evidence of the main witnesses, they should not hesitate to convict the prisoners of culpable homicide amounting to murder, for I do not see any circumstance to take it out of that category. I should be sorry to say that, in every case where a fellow-creature is barbarously and coolly put to death, murder could not be sustained, unless a motive or previous ill-will were proved. As it is, I have only to reject the appeal.

The 30th April 1867.

Present :

The Hon'ble C. P. Hobhouse, *Judge.*

Abetment—Grievous Hurt.

Committed by the Deputy Commissioner, and tried by the Judicial Commissioner of Assam, on a charge of abetting the commission of voluntarily causing grievous hurt.

Queen versus Doorgessur Surmah.

Where *A* ordered *B* and *C* to seize and forcibly take *D* in the contemplation of an assault upon *D*, and *D* was so beaten and tortured as to have died in consequence—Held that *A* was guilty at least of abetting the commission of voluntarily causing grievous hurt.

In this case the facts which appear on the record, so far as they affect the appellant Doorgessur Surmah, are these.

The appellant is a *namghur* or local authority in the village of Pandao in the District of Assam; and, on the 19th of Assin last, he directed two certain persons, accused and convicted with him, to seize and take a certain woman, since deceased, Goonai, to the house of a certain other woman, apparently the zemindar of the village, to answer to a charge of being with child, and, in so directing the above persons thus to seize and take Goonai, appellant was overheard to say that they would have to beat her, or otherwise she would not confess to her offence.

According to appellant's directions, the two persons above mentioned did seize the woman Goonai, and did forcibly take her to the house of the zemindar, and there she was so beaten and tortured that she died.

Whereupon appellant was charged, *first*, with abetting the culpable homicide not amounting to murder of the woman Goonai, and, *secondly*, with abetting the voluntarily causing of grievous hurt to the said woman; and was, under the direction of the Judge (who charged the Jury, if they believed the evidence, to find appellant guilty of one or other of the above charges), found guilty of the second offence, and was sentenced by the Judge to five years' rigorous imprisonment.

These facts being so, pleader for appellant contends that the finding of the Jury and sentence of the Judge are based upon an error in law, inasmuch as his client never intended that a grievous hurt should voluntarily be caused to the deceased woman, and that, therefore, he could not be said to have abetted such hurt.

In this case, however, the law and the facts **Vol. VII** are equally against appellant; for it is clear upon the facts that appellant ordered, *i. e.*, in the words of the law "instigated," two other persons to seize and forcibly take the deceased in the contemplation of an assault upon her; and it is laid down distinctly in Explanation 2, Section 107, Indian Penal Code, that "whoever, prior to the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates it, is said to aid the doing of it."

Here, then, I find that appellant not only, prior to the commission of an act, did a thing which facilitated that act, and was, therefore, an abettor within the Statute, but that he even went further, and contemplated, to some extent at least, the commission of that very offence by which the death of the deceased was eventually brought about.

Not only, then, has appellant no ground of appeal, but upon the evidence I could have wished that the Judge had summed up more decisively, and that the Jury had found appellant guilty of the major offence with which he was charged, and that the sentence of the Judge had been heavier.

The 30th April 1867.

Present :

The Hon'ble C. P. Hobhouse, *Judge.*

Unlawful Assembly—Dacoity—Admission.

Committed by the Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of dacoity, or assembling for the purpose of committing dacoity.

(Queen versus Kendra Kamar and others.)

Case of an unlawful assembly, the members of which were held guilty of an offence under Section 402 of the Penal Code on their own admission that they not only knew that the assembly was an assembly for the purpose of committing dacoity, but also that all the persons (including themselves) constituting the assembly lived on the proceeds of dacoity, and had no other means of living.

ol. VII. THE facts of this case, as proved in evidence on the record, are these :—

The Police had received information that a gang of dacoits, of whom one of the leaders was said to be the prisoner Kendra, was assembled in temporary huts in a certain jungle for the purpose of committing dacoity; and that, in the neighbourhood of this jungle, several dacoities had been committed—so many, indeed, that the villagers were in terror of the place. Thereupon the Police set informers to obtain information, and these informers had proceeded so far as to have ascertained and informed the Police of the whereabouts of the supposed gang.

Meantime, a dacoity was committed in the house of the prosecutor, and at the time of that dacoity he, and at least one other person, identified the man Kendra as amongst the dacoits, and this identification seems to be placed beyond a doubt by the fact that these two had known Kendra well before; that they had plenty of time and opportunity for recognizing him on this occasion; that they were under no fear nor consequent confusion of mind; and that they at once mentioned to others the fact of the recognition.

Immediately after the dacoity, certain of the witnesses followed on the traces of the dacoits which would seem to have been sufficiently plain, marked the dacoits down in the huts of the jungle above referred to, and gave immediate information to the Police.

The Police at once came down in force, surrounded the temporary settlement of huts, arrested all the prisoners, and searched the huts, and found in them a quantity of property, some capable of easy identification, and all identified as the property of the prosecutor stolen at the dacoity.

Out of this occurrence arose the charge of dacoity against Kendra, and of assembling for the purpose of committing dacoity, against him and against the other prisoners.

The cases against the prisoners Kendra, Koka, Bhaima, and Sreemutty Josadah, admit of no doubt. Kendra was identified at the dacoity, and in his house was found property stolen thereat; and the others distinctly admitted that they formed a part of a number, more than five, of persons assembled to commit dacoity.

The admissions of these prisoners would not, of course, be evidence against any persons other than themselves; but there is ample independent evidence to shew that the

assembly in the jungle was an assembly of persons for the purpose of committing dacoity.

If then these persons so assembled were assembled for the purpose of committing dacoity, it would follow that others assembled with them were, when it was shewn that they were aware of the purpose of the assembly, assembled for that purpose.

Now, in this particular case, all the prisoners admit, and these admissions are evidence against them, that they not only knew that the assembly was an assembly for the purpose of committing dacoity, but also that all the persons, including themselves, constituting the assembly, lived on the proceeds of dacoity, and had no other means of living.

Reading, therefore, Section 402 with Section 142 of the Indian Penal Code together, I concur with the Judge below that the prisoners were guilty of an offence within the meaning of Section 402; and, as I think that the respective sentences are appropriate, I dismiss the appeal.

The 4th May 1867.

Present :

The Hon'ble F. A. Glover, *Judge*.

Kidnapping.

Queen versus Mussamat Oozcerun.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of kidnapping.

An enticing away of a child playing on a public road is kidnapping from lawful guardianship.

THERE is no ground of appeal in this case. The Jury were directed to find on the evidence whether the prisoner enticed away the child from lawful guardianship, and they found that she did.

There was evidence in the record to support this finding, and the Jury chose to believe it; the question was one of fact.

On the question of law, the Sessions Judge's explanation, that a child playing about on a public road is still under the lawful guardianship of its parent or relative living close by, as the case may be, was quite correct.

The appeal is dismissed.

The 6th May 1867.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges*.

Section 223, Penal Code—Public Servants—Convict Warders.

Referred Jurisdiction.

Queen *versus* Kallachand Moitree.

Convict warders are "public servants" within the meaning of Section 223 of the Penal Code.

Seton-Karr, J.—We think that the order of the Sessions Judge was wrong, and that "convict warders" are "public servants" within the meaning of Section 223 of the Penal Code. Whatever may have been their position formerly, there is no question that under the new Jail Rules (403-A) they are empowered to keep persons in confinement, and they are none the less so empowered because they are themselves in confinement. That being so, they fall under the definition of public servants to be found in Section 21, Clause 7, of the Penal Code.

As the effect of the Judge's order has been to acquit the prisoner, we do not reverse that order, but merely intimate our opinion that it was wrong.

The 6th May 1867.

Present :

The Hon'ble W. S. Seton-Karr, *Judge*.

Section 94, Registration Act, XX. of 1866—Abetment of false personation.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of making a false statement in a proceeding under Act XX. of 1866, and false personation.

Queen *versus* Soleemooddeen and others.

Three persons, who put up a fourth to personate one whose authority was required to complete a conveyance of immovable property, were held guilty under Section 94 of the Registration Act, XX. of 1866.

This is an appeal against a conviction of three persons under Sections 91 and 93 of the Registration Act, XX. of 1866.

The conviction has taken place by a Jury, ~~Vide 113~~ and the appeal is therefore limited to a point of law. The pleader for the appellants lays stress mainly on the wording of Section 93, and urges that none of the prisoners can be correctly said to have "falsely personated another." The evidence discloses that some one was put up before an Ameen, who was acting under the law in question, to personate one Nussurunnissa, whose authority was required to complete a certain conveyance of some immoveable property, and that the three prisoners were the persons who got up the false personation. Strictly and technically speaking, then, the prisoners would not be guilty under Section 93, as they did not falsely personate any one themselves. But they would, all of them, be guilty under Section 94, which provides a penalty of imprisonment for seven years for abetment of any offences under this Act and within the meaning of the Indian Penal Code.

There can be no doubt that, from the indictment, the prisoners knew that they would have to meet a charge of getting up some one else to personate Nussurunnissa, and that they consequently have had every opportunity of pleading to, and of meeting and rebutting, all the facts requisite to constitute an offence punishable under Section 94.

In this state of things, Section 426 of the Criminal Procedure Code will come in; and, as the accused have not been sentenced to a larger amount of punishment than might have been awarded under Section 94, and as they have not been prejudiced by the mere technical error that has occurred, there is no reason to interfere or to order a new trial. Under Section 21, Criminal Procedure Code, trials under any local or special law would be conducted under the Criminal Procedure Code.

The offence is one deliberately perpetrated, and it requires a severe sentence.

The appeals are rejected.

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The 6th May 1867.

*Present :*The Hon'ble W. S. Seton-Karr, *Judge*.**Waging war with friendly Power—Pardon—
Mitigation of punishment.***Committed by the Assistant Commissioner,
and tried by the Deputy Commissioner of
Cachar, on a charge of waging war against
the Raja of Moneepore, an Asiatic power
in alliance with the Queen.***Queen versus Sajowpa.**

Application for pardon or mitigation of punishment for a political offence (*c. g.*, for waging war against a power in alliance with the Queen) should be made to the Executive Government.

THE petitioner has pleaded guilty to the offence of waging war against a power in alliance with the Queen (Section 125, Penal Code).

Nothing is stated in the petition of appeal, and the appellant has had a fair trial. If, for a political offence, he desires pardon or mitigation of punishment, he should apply to the Executive Government which, in such a case, can best say whether his offence has been too severely punished, and whether political considerations will admit of the exercise of the prerogative of mercy vested in the representative of the Queen.

I decline to interfere, there being no ground on which, as a judicial tribunal, I could properly interfere in such a case.

Appeal rejected.

The 7th May 1867.

*Present :*The Hon'ble F. A. Glover and C. P. Hobhouse,
*Judges.***Murder.****Criminal Referred Jurisdiction.****Queen versus Bishendharee Kahar.**

Curious case of murder where a father sacrificed his son, because wealth had not accompanied its birth, and afterwards cut his own throat as a protest against his deity's injustice.

Glover. J.—THIS is a very peculiar case of murder. Bishendharee, the prisoner, was found on the morning of the 17th January last sitting at the mouth of a cavern which contained a locally celebrated shrine of Mahadeb, with his throat partially cut.

Information of his having been seen there was conveyed to the chowkeedar of Buckhora (witness No. 1) the evening before, by two travelling pilgrims, who had passed by the place, had seen the man sitting wounded in the manner described, and had been told by him that he had sacrificed his son to Mahadeb within the cavern. These men were wandering pilgrims, and their whereabouts has not been traced; but, acting on their information, the chowkeedar proceeded at once to the nearest Police-station. He arrived there some time after midnight, and the next morning, accompanied by a head constable, policemen, and three other persons whom the party appear to have fallen in with on the road, started for the shrine. They reached the place, a wild uninhabited spot, in the midst of a dense jungle, about 9 A.M., and found the prisoner Bishendharee still sitting there. He was badly wounded in the throat, and spoke with difficulty, so much so that the constable suggested that, if he could write, it would be better if he made his statement in that way. The prisoner complied, and wrote in Hindee a paper marked A in the record, in which, amongst other things, he declared that he had sacrificed his son to the god, and that the body was in the shrine. A bloody knife was lying close by Bishendharee, which he was unwilling to give up to the Police, and which eventually had to be forced from him. The prisoner also endeavoured to prevent the constable from searching the cavern, alleging that, if he did so, the benefit of his sacrifice

would be lost, and that, if left alone, his son would come to life again in three days.

The Police lighted torches, and proceeded inside the cavern, leaving Bishendharee in custody outside. The shrine was situated low down in the mountain more than 1,000 yards from the entrance, and on a stone which jutted out from beneath the figure of the god was found the prisoner's little son, a boy of some 5 years, with his throat cut, and quite dead.

The above facts are clearly proved by independent testimony, as well as by the depositions of the Police.

At the entrance to the cavern were posted up two papers in Hindec, proved to be in the plaintiff's hand-writing, containing wild rambling complaints against his god, and statements to the same effect generally as those written in the paper A; in one of them he desired that his wife might be informed of what had happened.

The contents of the paper A are to the following effect: "I, Bishendharee, made a vow, no one beat me. I sacrificed my own life voluntarily; my son will come to life on Tuesday; my son is on the Mahadeo. If you take him down, it will be a sin to you. I made a vow, in case a son should be born to me, to sacrifice Ganges water, and do pooja. A son was born, but no wealth came; for this reason I sacrificed my son Ram Topsain. I cut my son's throat with this knife, and then my own. You go and tell this to your master, the Magistrate. If he does not believe your statement, to save yourselves, shew him this. If you remove me, I shall not survive. I sacrificed him on Wednesday, four days ago—it was past noon." The child's body and the prisoner were taken into Sasseram, where the latter was some time under medical treatment in Hospital.

On being brought before the Magistrate, he denied having written the paper marked A, and repudiated its contents. He asserted that, whilst at the cavern, he had been set upon during his sleep by five men, viz., Gonesham Geer, the malik of his village, Neamut, Sirdar, and two others, that these men murdered his child, and very nearly succeeded in murdering him also by cutting his throat.

He called no witnesses to support this defence; but he conducted his case with considerable acuteness, and cross-examined the prosecution-witnesses shrewdly and well, without, however, being able to elicit any-

thing favorable to his plea that the persons above named were at enmity with him, and had attacked him out of revenge.

The native doctor of Sasseram, however, did depose that the wound on the prisoner's throat was not, in his opinion, self-inflicted. He gave reasons for so thinking, the chief of which were that the cut was too uniform in depth, and too even, and that the blade of the knife, which was only 3 inches long, could not have made a cut of 4 inches long.

The Civil Surgeon of Arrah, who saw the prisoner afterwards when the wound was nearly healed, was not able to give a positive opinion, but considered that the appearance of the man's throat was not inconsistent with the hypothesis of attempted suicide.

Now, we see no reason whatever to doubt the credibility of the witnesses who saw the paper A written by the prisoner, and so much of the deposition of the head constable as relates to the discovery of the child's body in consequence of the information supplied by the prisoner in that document is admissible evidence, and both together prove that Bishendharee confessed to having sacrificed his child to Mahadeo.

This evidence is corroborated by independent proof that the paper A is in the prisoner's hand-writing, and that the knife which was found on the chowkhat of the cavern covered with blood belongs to him.

We consider it proved that Bishendharee killed his child.

The question remains whether there is any reason why he should not be convicted of the murder in consequence of his being at the time incapable of discerning between right and wrong, or of knowing that what he did was contrary to law.

Now, not only does the prisoner himself strongly deny the fact of his ever having been insane, but all the evidence points the same way. The witnesses, men of his own village, and in two cases connected with him by family-ties, say indeed that he was a confirmed drunkard, and, when in liquor, behaved himself outrageously, but not one, not even the prisoner's wife, asserts that he was ever out of his mind.

The prisoner's conduct at the time of his discovery by the police is inconsistent with the idea of insanity. He had sacrificed his son (he said) because wealth had not accompanied its birth, and had cut his own throat as a protest against his deity's injustice, and

Vol. VII. he advised the police to make the affair clear to the Magistrate, and to save themselves from any possible blame by shewing him what had been written.

In short, although there may have been some degree of religious enthusiasm or even hallucination, there is nothing to show that Bishen killed his child whilst in a state of mind that incapacitated him from knowing right from wrong. It seems to us rather that he did expect to receive some worldly benefit from the sacrifice of his son, and that wealth would come to him, and his dead child be restored to life again together.

A reason (though not a strong one) for supposing Bishen insane might have been found in the meaningless atrocity of the act, had not the prisoner's own explanation of his conduct solved the difficulty, and shewn that there *was* a meaning in his proceedings.

We convict the prisoner of the murder; but, taking all the circumstances into consideration, think that the ends of justice will be sufficiently met by a sentence of transportation for life.

The 7th May 1867.

Present :

The Hon'ble F. B. Kemp, W. S. Seton-Karr, and F. A. Glover, Judges.

Perjury.

Queen versus Bishoo Bewa and Pipree Bewa.

Committed by the Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of false evidence.

Case of perjury by females in which the majority of the Court refused to reduce the punishment.

Glover, J.—The guilt of both these prisoners appears to me fully established, and the only question for consideration is the propriety of the sentence.

The Assessors recommended the prisoners to mercy on the ground that they were women, and had just suffered a severe domestic loss.

I do not think that their behaviour throughout these proceedings shows them to have been much affected by the death of Ali, but on the other ground, *viz.*, that the prisoners are ignorant women easily intimidated or led by the village authorities, I think it but fair to treat them somewhat more leniently than the generality of male offenders.

I do not forget their conduct in endeavouring to make the most of the Naib's difficulty. Still the sentences passed, 5

years' and 3 years' rigorous imprisonment, appear to me disproportionate to the offence, and, taking the recommendation of the Assessors into consideration, would reduce them to 3 years in case of Pipree, and to one year in the case of Bishoo. The imprisonment in both cases to be rigorous.

Seton-Karr, J.—I regret that I am unable to concur in the propriety of reducing the punishment of these two prisoners. I cannot take on myself what I call a serious responsibility in direct opposition to the reasons given by the Judge for not acting on the recommendation of the Assessors to mercy, which reasons I consider to be good and sound, and to be justified by the whole case.

It is clear that the two women were very little affected by the death of the chowkidar, who was the husband of one of them. They were quite ready to obstruct and paralyse justice on condition of receiving a reward. In spite of their suspicions against the Naib Ram Gobind Sandial as the instigator of the murder, they were both of them ready to ask for 100 Rs. and a beegah of lakheraj land as the price of their silence.

The Judge says that the prisoners by their demeanor in Court "show that they know perfectly well what they are about, and that they could not have been persuaded into acting as they have done, unless they had been most ready to adopt the course indicated to them; they acted either from motives of cupidity or perverse and criminal indifference, and must bear the consequences of their conduct."

I am always ready to listen to recommendations for mercy, or to lessen the punishment for false evidence, unhappily so common in our Courts, when the same is delivered partly from helplessness or ignorance, or from no very bad and corrupt motive, but merely from sheer indifference to truth. But here the perjury was clearly deliberate, and was committed from very bad and corrupt motives.

I would allow both the sentences to stand. I think the Judge in this case is much more to be trusted than the Assessors.

The case must go to a third Judge.

Kemp, J.—I concur with Mr. Justice Seton-Karr. There is, in my opinion, nothing in the case of these prisoners making them fit objects for mitigation of punishment. They seem to me to have acted throughout the matter with utter indifference to their domestic bereavement and with corrupt motives.

The 7th May 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

**Culpable Homicide not amounting to murder—
Unlawful Assembly—Riot.**

Queen *versus* Mana Sing and others.

*Committed by the Magistrate, and tried by
the Sessions Judge of Gaya, on a charge
of being members of an unlawful assembly
in prosecution of the common object of
which death was the result.*

In a case of riot in which a man was killed, the whole of the members of the unlawful assembly, as well the victorious as the worsted, were held equally guilty of culpable homicide not amounting to murder.

Kemp, J.—In this appeal there are two parties before this Court—the villagers of Aone on one side, and those of Deonee on the other; and the cause of the dispute was the right of user in a water-course—a fruitful cause of affrays in the Behar district. It is clear that the Deonee villagers erected a dam, and thereby obstructed the free passage of the water from the river Jumna.

It is said for the Aone party that, ignorant of the fact of the Deonee villagers being collected at the bund, they went for the purpose of removing the obstruction and restoring the natural flow of the water, but this hypothesis is entirely inconsistent with their acts as well as the evidence. The large number of the party, said to be one hundred, the being armed with heavy sticks and gorassas, a description of battle-axe of a deadly character, shews that they went anticipating a fight, and with the intention, by means of criminal force, to enforce a supposed right at all risks. There was time to have had recourse to the protection of the public authorities; indeed, if they had not gone to the disputed bund, there would have been no riot at all.

A man has been killed in this riot, struck down by a blow on the head. The offence is culpable homicide not amounting to murder; and as the offence was committed in carrying out the common and unlawful object of the meeting, the whole of the members of that unlawful assemblage are liable. Taking this view of the case, we confirm the conviction and sentence passed by the Sessions Judge, and reject the appeal.

The Deonee party are equally to blame, **Vol. VII.** though they were, simply from inequality in number, worsted in the fight. They were wrong in the first instance in damming up the water-course by show of force, and in opposing the Aone party, instead of retreating and seeking the protection of the law.

The appeals are rejected.

The 5th May 1867.

Present :

The Hon'ble L. S. Jackson and W. Markby,
Judges.

Duty of Judge (in weighing Evidence).

*Committed by the Magistrate, and tried by
the Sessions Judge of West Burdwan, on a
charge of dacoity.*

Queen *versus* Kalu Mal and others.

A Judge cannot properly weigh evidence, who starts with an assumption of the general bad character of the prisoners.

Markby, J.—In this case nine prisoners have been convicted of dacoity, and have appealed to this Court.

The evidence consists entirely of that of the witnesses to the identification, no property having been found in the possession of any of the prisoners.

The prosecutor identifies the prisoners Kalu Mal, Gody Mal, and Boro Nundo Mal, whom he knew before. He says he recognizes the other prisoners as having been present at the dacoity, but did not know them before.

Witness No. 2 identifies all the prisoners, and says he knew them all before.

Witness No. 3 identifies all the prisoners, and says he knew them all before.

Witness No. 4 identifies Kalu Mal, Chundu Mal, and Cheedam Roy, and says he knew them before.

There can be no doubt that there is here (if true) ample evidence against all the accused; and if, after having been duly weighed, it

Vol. VII. has been credited by the Sessions Judge and the Assessors, the conviction ought to be affirmed.

But I observe that, throughout, the witnesses seem most improperly to have given evidence of the general bad character of the prisoners, and that the Sessions Judge commences his observations on the case by remarking that "this is a case of dacoity committed by *professionals*, of whom a father and his two sons besides other relations are at length brought to justice. The father *has been punished before*. But the *notoriously bad character of each and all of the prisoners* may be estimated from the fact that Doorga Churn refused to have their houses searched, as such *notorious robbers* would never keep stolen property in their houses."

It is true that the Sessions Judge proceeds afterwards to consider the evidence, and states generally that he is satisfied with the identification. But to recognize persons at night by torch-light and in the confusion of a struggle, as the witnesses in this case professed to do, though by no means impossible, is not easy, and the evidence, therefore, ought to have been very carefully weighed and sifted. I do not think that a Sessions Judge can possibly perform this part of his duty in a satisfactory manner, who starts with an assumption of the general bad character of the prisoners. Such a consideration was wholly irrelevant to the issue which the Sessions Judge had to try in this case, and, so far from relying on this evidence as he appears to have done, he ought never to have received it, or, if by inadvertence he received it, he ought to have made every effort to shut out the effect of it from his mind when weighing the evidence given to prove the participation of the prisoners in this particular crime.

For these reasons, I am not satisfied with the verdict, and think it ought to be reversed, and that the prisoners ought to be put again upon their trial.

I also think that the Police Officer who conducted the enquiry ought to have been called, and that he did entirely wrong in refraining at the instance of the prosecutor from searching the prisoners' houses. I consider the explanation of this omission to be highly unsatisfactory.

Jackson, J.—I concur in reversing this conviction, and ordering a new trial, which should be before new Assessors.

The 18th May 1867.

Present:

The Hon'ble F. B. Kemp, *Judge*.

Evidence—Kidnapping—Sale of girl for purposes of prostitution.

Committed by the Magistrate, and tried by the Sessions Judge of East Burdwan, on a charge of disposing of a minor girl for the purpose of prostitution, &c.

Queen versus Doorga Doss and others.

The evidence of a kidnapped girl, if thoroughly credible, is legally sufficient for a conviction for kidnapping. There is nothing illegal in passing separate sentences for kidnapping and for selling for purposes of prostitution.

THESE prisoners have been tried by Jury. The charge to the Jury is a proper one. They were properly told that the evidence of the principal witness, the girl who was kidnapped, if thoroughly credible, was legally sufficient for conviction; but at the same time, they were cautioned to receive it after mature consideration and scrutiny. I see no reason for interfering, and confirm the conviction and sentence, rejecting the appeals.

With respect to the appeal of Nobin Bagdee, I have to observe that there is nothing illegal in passing separate sentences for the offence of kidnapping and for the offence of selling for the purposes of prostitution, which are separate and distinct offences. It does not follow that, because a person entices away a minor under the age of 16 years out of the keeping of her lawful guardian, it is necessarily with the intention of selling her for the purposes of prostitution.

The 20th May 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Jurisdiction—Perjury—Land Disputes.

Criminal Revisional Jurisdiction.

Queen versus Buloram and another.

A Magistrate has no jurisdiction to try, but must commit to the Sessions, a case of perjury committed before him in the course of a proceeding taken under Section 318 of the Code of Criminal Procedure.

Glover, J.—We are of opinion that the Magistrate acted without jurisdiction in this case, and that his order should be quashed.

The question turns upon the meaning of the words "judicial proceeding;" and there can, we think, be no doubt that proceedings taken under Section 318 of the Code of Criminal Procedure are "judicial proceedings" in the sense of Section 193 of the Penal Code, even though they may possibly not terminate in a judgment.

Now, this Section leaves the officer who holds such "judicial proceedings" no apparent option. The words are "*shall* be punished with imprisonment," &c., and the Schedule to the Code of Criminal Procedure, which refers to it, makes the Court of Session the only Court that can pass sentence, and a Magistrate can do no more than hold the preliminary enquiry.

Section 181 of the Penal Code, under which the Magistrate has acted in this case, appears to us to refer to matters which do not come under the definition of judicial proceedings; and, although the wording of the Section is apparently large enough to admit false statements of every description, its action is restricted as regards those made under certain circumstances by the succeeding Section 193. Were it not so, the Magistrate of a District acting under Section 181 might try all cases of perjury himself instead of committing them, as he is no doubt bound to do, to the Sessions.

It appears to us, therefore, that, as the appellants gave false evidence in the stage of a judicial proceeding, the provisions of Section 193 must, of necessity, be applied to the case, and that the Magistrate had no jurisdiction. His orders are quashed, and he is directed, if he see fit, to commit the offending parties to the Sessions Court.

The 25th May 1867.

Present:

The Hon'ble F. B. Kemp, W. S. Seton-Karr, and C. P. Hobhouse, *Judges*.

Misdirection—Perjury.

Committed by the Magistrate of Furreedpore, and tried by the Sessions Judge of Dacca, on a charge of false evidence.

Queen versus Rammoni Sein and another.

Where *O* deposed that he and *R* were 4 days in company at *M*, and the Judge charged the Jury that, if they found that *R* was not in company with *O* during those 4 days at *M*, but was at *S*, it did not matter where *O* was, because it was clear that he could not have been in company with *R* at *M*, and must therefore have given false evidence when he said that he was during those 4 days in such company at *M*—HELD by the majority of the Court (Seton-Karr, J., dissenting) that there had been no misdirection.

Seton-Karr, J.—In this case I have read Vol VII. all the evidence against the two prisoners who have been convicted of giving false evidence.

Against Rammoni Sein the conviction appears to me good. The Jury had to choose between two stories: one was a long story which he himself set up to the effect that he went to Mymensingh about the end of Bysakh, stayed there two or three days, and came back to Dacca. He stated, also, that he had paid a visit to Noakhally, but this was at the beginning of Bysakh.

The other was a story supported by witnesses who had full reason to know what they were talking about, to the effect that Rammoni was, during all *Joisto* and up to Asarh, at Noakhally, and that, therefore, he could not have been, at the end of Bysakh, at Mymensingh. Seeing that Mymensingh and Noakhally, as far as the District of Dacca is concerned, are at the two opposite poles, and that the evidence to both versions was so precise and distinct as to be incapable of reconciliation, the Jury, it seems to me, were rightly directed, and were left to credit whichever version they preferred. It is a natural and legitimate consequence of their opinion on the evidence that Rammoni had sworn falsely and deliberately to his presence at Mymensingh, Dacca, and Jaydehpore in the end of Bysakh and on the 3rd and 2nd of *Joisto*.

But with regard to the other prisoner, Obhoy, the case seems different.

It is not said by any one that he went to Noakhally with Rammoni. It is said for the prosecution that he was not at Mymensingh for four days at the end of Bysakh. But it is not shewn where he was during those days.

The Judge was, it appears to me, wrong in telling the Jury that, though the evidence for the prosecution, that Obhoy was not at Mymensingh on those dates but at home, was not very positive, yet, "if you find it proved that Rammoni was not at Soodaram" (Noakhally) at the time the two prisoners "stated they were here and in each other's company, the defect of the evidence as to where Obhoy actually was is immaterial."

Obhoy ought not to be convicted of false evidence for simply saying that he was at Mymensingh, because it is clearly proved that his companion was at Soodaram, the sudder station of Noakhally. I cannot think that his case ought in fairness to be treated as if it was so entirely bound up in, and connected with, the case of his fellow-prisoner, though Obhoy did certainly say in a

Vol. VII. general way that he was in the company of Rammoni. The evidence to convict him should, moreover, leave no reasonable doubt that he was not, and could not have been, at Mymensingh at the time when he says he was; and that he wilfully and knowingly made a false statement in saying that he was there. Now, Obhoy merely said as regards the Mymensingh visit: "We arrived in Mymensingh in five or six days; we were four days in Mymensingh. I went to Gopal Doctor as *Umedwar*," &c. Now Gopal Doctor, witness No. 2, certainly says, "the prisoners Rammoni and Obhoy Chunder never went to my residence at Mymensingh. I never saw them there." This does not amount to more than one oath against another, and it is quite possible that the prisoner Obhoy may have gone to Gopal's house at Mymensingh without having seen him. Another witness for the prosecution, Juggobondho Sein, states that Obhoy Sein was at *home* part of those two months (Joisto and Assar), and sometimes *from home*. This is not inconsistent with a visit to Mymensingh. The Jury should have been charged on this prisoner's case *quite differently* from the case as against Rammoni Sein. I hold that he has been prejudiced by a misdirection from the Judge, and that there is substantially nothing but the oath of Gopal against him, while nothing was put to this witness in cross-examination to ascertain if Obhoy might not have gone to Mymensingh without the witness becoming aware of the fact. The other evidence for the prosecution either has no bearing on the guilt of this prisoner, or is somewhat favorable to him. Witness No. 6, Mohima Chunder Baroi, does say that the two prisoners never went to his house at Dacca at the end of Bysakh or beginning of Joisto; but the prisoner Obhoy is not charged with falsehood for saying the contrary.

On the whole, I think, the misdirection and the want of sufficient legal evidence are enough to entitle this prisoner to a new trial, if not to his immediate acquittal. Let the case go to a second Judge.

Hobhouse, J.—I regret that I cannot concur with my learned colleague in the opinion that the prisoner Obhoy Chunder Sein was prejudiced by the summing up of the Judge in the Court below, and that his condemnation and sentence are therefore illegal.

The charges against this prisoner were two: *viz.*, that he gave false evidence when he deposed, *first*, that he and one Rammoni were four days at Mymensingh, and that he

went to Gopal Doctor's house; and, *secondly*, that, on his return on the 2nd of Jeyt, he saw one Nundo Koomar in one Kalinarain's house.

When, therefore, on the first part of the first charge, the Judge below charged the Jury to the effect that, if they found that the above Rammoni was not in company with the prisoner Obhoy during the above four days at Mymensingh, but was at Soodaram, another place, then it did not matter where Obhoy was, because it would be clear that he could not have been in company with Rammoni at Mymensingh, and must, therefore, have given false evidence when he said that he was, during those four days, in such company at Mymensingh. I think that the Judge charged the Jury properly.

The statement of Obhoy was that, during four certain days, he was in company with Rammoni at a certain place in Mymensingh. The Jury were charged to find, and did find, that Obhoy was not, and could not have been, in company with Rammoni during those four days at that place—Mymensingh; because, as a matter of fact, Rammoni was during those four days at Soodaram, miles away; and it followed on this finding that Obhoy was guilty of a false statement.

I think, therefore, that there is no error of law within the reading of Section 408, Code of Criminal Procedure, on which to found any interference with this finding of the Court below.

The case must go before a third Judge.

Kemp, J.—(On referring to the petition of appeal, I do not find that any complaint is made that the prisoner Obhoy Churn has been in any way prejudiced by a misdirection to the Jury. I entirely concur with Mr. Justice Hobhouse, and for the reasons stated by him.

The 20th May 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, Judges.

Culpable homicide not amounting to Murder.

Committed by the Magistrate, and tried by the Sessions Judge of West Burdwan, on a charge of murder, &c.

Queen versus Rajoo Ghose and others.

Where a person snatches up a log of heavy wood and strikes another with it on a vital part with so much force and vindictiveness as to cause that other person's death almost on the spot, the act must be held to have been

Vol. VII. The offence that Heeroo, on the evidence and in truth, committed was that of thumping and kicking Cheedam ; and it is clear that he had no intention to go further, for he actually had a "sâl" log in his hand, and he did not use it, but resorted rather to the milder assault. And so, also, with the prisoner Neeroo : he instigated the others to assault, but he took no other part in it, and never even attempted to use the weapon he had snatched up.

I would, therefore, reduce the sentences on these men also to one year's rigorous imprisonment.

The offence of Rajoo is more heinous, for it was he who, with the former quarrel and present passion in his mind, struck the fatal blow. I would therefore sentence this prisoner to five years' rigorous imprisonment.

Jackson, J.—I concur in mitigating the sentence passed to rigorous imprisonment for one year in the case of all the prisoners except Rajoo, and three years in his case.

Hobhouse, J. I concur that the sentence in mitigation on Rajoo should be three years.

The 27th May 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,

Judges.

Evidence—Charge of Judge.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of murder.

Queen versus Bhekoo Sing and others.

Bare statements of prisoners are not admissible in, and ought not to be alluded to by the Judge as, evidence. Nor is evidence taken before the Magistrate, unless contradictory of the evidence of the same witnesses as given before the Sessions Court, evidence in the trial, or proper to be put to the Jury.

Glover, J.—THE evidence in this case was very fully laid before the Jury, and no point of law is raised in the appeal which would justify our interfering with the finding.

There is one part, however, of the Sessions Judge's charge which we must notice, although, from the prisoner's not having been prejudiced by it, the error is of no direct consequence so far as this appeal is concerned.

Speaking of the prisoners Nos. 83 to 90, the Judge says : "They may be taken as witnesses for each other ; and the question is whether you will accept their story or that of the prosecution, and for that purpose you must compare them both, point by point."

This, we observe, is not a correct view of the law, and there could be no comparison drawn between sworn depositions of witnesses on the one hand, and bare statements of prisoners on the other—statements which they had the most direct interest in making, and which, if credited, would have the effect of absolving the makers from the offence charged against them.

Such statements were altogether inadmissible ; they were no evidence at all, and the Judge ought not to have alluded to them as evidence.

There are circumstances where any one of a number of prisoners jointly indicted can be called as a witness either for or against his confederates ; but in this case none of the prisoners were called as witnesses on behalf of any of their fellows (*vide* VI. Weekly Reporter 91).

We remark, further, that the Sessions Judge laid some stress on the evidence taken before the Magistrate : this evidence, unless it was contradictory of the evidence of the same witnesses as given before the Sessions Court, was not evidence in the trial, and should not have been put to the Jury.

But as these errors in direction were in favor of the prisoners, as we observed before, they form no ground of appeal.

The appeals of all the prisoners are rejected.

The 27th May 1867.

Present :

The Hon'ble W. S. Seton-Karr, *Judge*.
Criminal Breach of Trust—Responsibility of Nazir.

Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of criminal breach of trust.

Queen versus Tofuzzal Ali.

A Nazir is the head of an important department, and must be responsible for the truth of what he reports or admits. He cannot be permitted to avoid responsibility by urging that his mohurrir deceived him.

This is a case in which a Nazir has been convicted of four different instances of criminal breach of trust, and by a Jury.

The prisoner has put in written grounds of appeal, some of which on the face of them are manifestly untenable; but he has been heard fully by his pleader, Baboo Chunder Madhub Ghose, who has urged on the Court all that was in his power as to misdirection on the part of the Judge, especially in regard to charges 1st and 2nd, which were taken and considered together at the Sessions.

The expressions laid stress on really amount to very little and concern the receipt said to have been given by the acting Nazir, and the Judge's insinuation or expression that the receipt may have been given after the case had been brought against the Nazir. But it is not necessary to dwell at any length on this point. On charges 3 and 4 the pleader can say but little; and, in truth, there is nothing that could be said in them to make out error of law, or such misdirection that justice had thereby miscarried.

In these instances, the prisoner, being the Nazir of the Kooshtea Court, admitted that he had reported that certain monies had been paid in. The cases on which he so reported were struck off, being apparently cases of recovery of money in execution, and the Nazir cannot now be permitted to avoid his responsibility by urging that his mohurrir deceived him, and that he had been led to report that the money had been received through faith in his mohurrir or from inadvertence. An officer such as a Nazir is the head of an important department, and he must be responsible for the truth of what he reports or admits, and there is other clear evidence in addition, in the case.

I have come to the conclusion that there was no failure of legal and sufficient evidence, and no case of misdirection, such as would call for a new trial.

The appeal is rejected.

The 28th May 1867.

Present :

The Hon'ble J. P. Norman, W. S. Seton-Karr, and C. P. Hobhouse, *Judges*.

Receiving property stolen at a dacoity.

Queen versus Jogeshur Bagdee and others.

Committed by the Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of dacoity.

In order to sustain a conviction under Section 412 of the Penal Code of receiving property stolen at a dacoity, it is necessary to prove that the prisoner knew or had reason to believe that dacoity had been committed, or that the persons from whom he acquired the property were dacoits.

Norman, J. I have read the petition of appeal, the direction to the Jury, the verdict, and sentence. There is no ground for questioning the propriety of the conviction or sentence, except as to two of the prisoners, Denoo Manjee and Sadoy Mitia.

As to Denoo Manjee, it is proved that, immediately after the commission of the dacoity, he was seen to conceal a gold paunchor, part of the property taken from the house of the prosecutor, in the ashes.

The Sessions Judge, Mr. Pigou, told the Jury that, if they believed the evidence, it was proved that, very shortly after the dacoity, the prisoner had possession of the paunchor stolen in the dacoity; that he refused to say how he got it, and therefore the legal presumption was that he joined in the dacoity and stole it, and that the Jury would be justified in convicting of the dacoity. If they disbelieved the witnesses, they would acquit him.

The Jury found him guilty of retaining stolen property, the possession of which he knew to have been transferred by the commission of dacoity.

And the Sessions Judge sentenced him to seven years' imprisonment.

It appears to me that the Judge left the question quite properly to the Jury, so far as regards the evidence on the charge of dacoity.

The possession of stolen property immediately after the commission of such an offence by a person who does not appear to be a receiver, or where there is no reason to suppose that the property has been obtained from a third person, may fairly lead to the inference that he who has profited by the crime was the person or one of the persons who committed it.

But I think that there was no evidence to warrant the verdict of the Jury. If the

Vol. VII. prisoner was not himself one of the dacoits, but a mere receiver, there is no legal inference and, in fact, in the majority of instances, there is no probability that the receiver would be informed of the crime by the person from whom he might purchase or acquire stolen property.

A receiver of stolen property would, in ordinary cases, ask no questions. I think a person cannot be convicted under Section 412 of receiving property the possession whereof he knows, or has reason to believe, to have been transferred by the commission of dacoity, unless there is some positive evidence that he knew, or had reason to believe, that dacoity had been committed, or that the persons from whom he acquired the property were dacoits.

I think, as there is no evidence sufficient in law to support the conviction, that conviction cannot stand. In fact, the evidence against the prisoner as a receiver was such as to warrant his conviction under Section 411, but not under Section 412.

As regards the prisoner Sodoy, the Judge says: "If you believe the evidence of Poran and Kali Churn (as to the property in the mul-mul), you will convict the prisoner of retaining stolen property, the possession whereof he knew to have been retained by dacoits, for it is his business to know where it came from; and, as he does not do so, the legal presumption is that he knew it was so obtained." He adds: "I think the charge of dacoity cannot be proved upon the mere presumption of having the property, because it is not proved that he had it ~~very~~ immediately after the dacoity, and it is not proved when the property was found in his house."

The Jury convicted this prisoner also under Section 412. My observations on the case of Denoo apply to this case also. I would quash the conviction as to these two prisoners, and, under Section 426, would substitute a conviction for receiving stolen property, the prisoner knowing or having reason to believe the same to have been stolen. And I would sentence the two prisoners to three years' rigorous imprisonment.

Seton-Karr, J. I think, after looking at the evidence on the record, which I sent for, that there was evidence sufficient to go to a Jury as to the retention of the property by the prisoners with the knowledge that the same had been actually acquired by dacoity.

The dacoity, and the almost immediate apprehension of some of the dacoits with bundles containing some of the property,

must have become widely known and discussed in the neighbourhood; and though I admit the general force of Mr. Justice Norman's remarks, yet I think, in this particular case, that there was no failure of legal evidence from which the Jury might justly believe or lawfully infer that the two prisoners, whose sentences he would reduce, took the property, not merely knowing it had been stolen, but knowing that it had been obtained by dacoity.

I would let the sentences stand as they are.

Hobhouse, J.—This case has been submitted to me as to a third Judge on the occasion of a difference of opinion between my learned colleagues, Messrs. Justices Norman and Seton-Karr, as to the degree of guilt attaching to two certain prisoners, *viz.*, Denoo Manjee and Sodoy Mutia.

It is found that a dacoity took place in the house of the prosecutor on the night of the 9th November last at a village called Kurtapookur, and that a pauchnor and a piece of mul-mul cloth respectively proved to have been stolen at that dacoity were, on the 11th and 15th November respectively, found concealed in the houses of the said prisoners.

The question is, whether or not these prisoners or either of them are guilty of retaining property stolen at a dacoity under Section 412, or simply of retaining stolen property under Section 411.

In the matter of the prisoner Denoo, I have no hesitation in concurring with my learned colleague, Mr. Justice Seton Karr, that he is guilty under Section 412.

The facts against him are these, *viz.*, that the dacoity occurred at Kurtapookur on the night of the 9th of November. That at daybreak on the morning of the 10th November, six of the dacoits were caught red-handed at the village of Chundee-pore; that he, Denoo, was a resident of Chundee-pore; that this same day, the 10th, he brought the pauchnor stolen at the dacoity into his house, just shewed the witness Nistamee what it was, and at once hid it in his ash-leap; that the very next day the property was there recovered; and that meantime he, Denoo, had absconded.

Now, when six dacoits were at daybreak following the dacoity, arrested with dacoity-stolen property at the village of Chundee-pore, it is clear to demonstration that the fact of the dacoity would at once be known universally in that village, and it would follow, *first* of all, that, if there was any

dacoit belonging to the village who had not been arrested, such a person would not be able to dispose of any plundered property he might have upon him; and, *secondly*, that, if any person should be found in immediate receipt of property stolen at the dacoity, the only (to my mind) reasonable or possible presumption would be that that person had received with a guilty knowledge of dacoity.

And so the facts are that this dacoity occurred on the night of the 9th; that all Chundeeppore knew of it at day-break on the 10th; that, on that very 10th prisoner Denoo had some of the stolen property on him, and was concealing it; and that, on the 11th, it was found on him, he meantime having absconded, and he subsequently having pleaded an *alibi*, to shew he was not at the dacoity, which broke down.

Applying every test that my learned colleague, Mr. Justice Norman, would apply I still think with Mr. Justice Seton-Karr that Denoo Mamee was legally found guilty under Section 412 (indeed, I should have been prepared to find him guilty under Section 395), and I would let the sentence on him stand.

In regard to Sodoy Mitha, the facts found are different.

The dacoity occurred at Kartapookur on the night of the 9th. There is nothing on the evidence to shew how any property stolen at the dacoity was traced to Sodoy at all; and all that I can discover from the record is that, whilst Sodoy is a resident of Jamsola in one district, the stolen property was, six days after the dacoity, found on him at Tantoolmunia in another district.

How and when he received the property, there is nothing to show; and there are no means of presuming accurately, for we don't even know how far Tantoolmunia was from the place of the dacoity, much less whether or not the fact of the dacoity was known at all in Tantoolmunia, much less still whether it was known to prisoner, and, if so, when it was known.

The first object of a robber is to get rid of his plunder; and, in doing so, he is not likely to mention, and the guilty receiver is not likely to ask, how and when he got it. It is a case of give and take, and no uncomfortable or compromising questions put or answered on either side; and thus it is quite possible that prisoner, the inhabitant of a stranger district, and, for anything that is in the evidence to the contrary, of a stranger village, six days after the dacoity, may have

received and retained, knowing, indeed, that the property was stolen, but not knowing precisely that it was stolen at a dacoity; and at any rate, I would give him the benefit of the doubt.

I concur, therefore, with my learned colleague Mr. Justice Norman in amending the sentence on this prisoner as he proposes.

The 28th May 1867.

Present

The Hon'ble W. S. Seton Karr, *Judge*.

False charge of Murder.

Queen versus Pectumlohl Puddhum.

Committed by the Magistrate, and tried by the Sessions Judge at West Burdwan, on a charge of instituting a false criminal charge with intent to injure.

Remark.—On the comparatively light sentence passed without any reason in a case when a false charge of murder was preferred and persisted in.

There can be no doubt that the prisoner did institute a serious charge of murder against Mudhusoolun and others, for he persisted in the same story in his defence, and he persists in it still in appeal against all the clear evidence to the contrary effect.

The only question, then, is whether there is any reason to imagine, either that the charge is true, or that the prisoner made it in perfect good faith. Now, as already said, there is every reason to conclude that there is no basis for the charge whatever. The evidence for the prosecution clearly shows that the two persons said to have been murdered died of cholera. The evidence of some witnesses for the defence is tantamount to nothing at all. Even if that of Gungaram Mundul and Gour Mundul could be believed, which it cannot, it would be wholly insufficient to support a charge of murder, though, if two persons had been really seen to be beaten for stealing sugar-cane, and if they had died immediately afterwards or on the next day, such an occurrence might form a ground for some cautious enquiry.

But it rests on evidence that the two men said to have been murdered died of cholera, and were known at the time to have so died; and it is also in evidence that the prisoner's father and uncle had been sentenced as dacoits for a dacoity in the house of the very person now charged with murder.

There is, therefore, every ground for concluding, not only that the charge was utterly false, but that the prisoner must have known

Vol. VII. that such a charge was false when he made it and persisted in it. Had it really been true, it would scarcely have been preferred in the way it was preferred.

I assume that the comparative lightness of the sentence is due to the prisoner's youth, and to the bare possibility that he may have been the tool of some one else, though the Sessions Judge does not assign such reason, nor, indeed, any reasons for the comparatively light sentence passed; otherwise it is not easy to conceive a charge of a more virulent and malignant character dictated from sheer spite, or one in which a heavy punishment would be more imperatively called for.

I can only regret that Act VI. of 1864 does not empower the Sessions Court to inflict a salutary whipping on such an offender in addition to imprisonment.

The appeal is rejected.

The 28th May 1867.

Present :

The Hon'ble W. S. Seton-Karr, *Judge.*

Forgery (Mode of sending records in appeal cases).

Queen versus Broond Shahoo alias Chundra Chatterjee.

Committed by the Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of fraudulently using as genuine a forged document with guilty knowledge.

In all forgery cases sent up in appeal, the particular paper or papers said to have been tampered with should be readily accessible, and should be put with the Sessions record, instead of being buried in the record of the committing officer.

A GREAT deal of time has been wasted over this case, because the most important paper on which the whole case turned, *viz.*, the original pass marked A, said to have been altered, had been buried in the mass of the record from the Magistrate's Office, instead of being put, as it ought to have been, in a prominent place with the duplicate marked A, the paper B, and the paper C, which were all with the Sessions record.

It is most important that, in all forgery cases sent up in appeal, the particular paper or papers said to have been tampered with should be readily accessible.

It is quite clear that the pass A has been altered in several places; the said alterations concern the amount of the salt, the name of the person to whom the pass was granted, the number of the carts, and the places of destination.

It is equally clear that the pass so altered was uttered or used by the prisoner at the Cuttack Collectorate, and, under all the circumstances, the inference is most legitimate that the prisoner knew that he was dealing with and uttering a forged document.

He had no defence to speak of; but he says in his petition of appeal that he had no object in making the alterations, and that he could derive no advantage therein.

But, as the Sessions Judge has remarked, it is clear that he did expect some advantage in applying for an *atrafec rowannah* on 221 maunds when he had only paid duty to Government on 100 maunds of salt.

The unanimous conclusion of the Judge and the Assessors as to the prisoner's guilt is that he fraudulently used as genuine a document which he knew, or had reason to believe, was forged, seems to me quite justified.

The sentence is not excessive.

The appeal is rejected.

The 29th May 1867.

Present :

The Hon'ble W. Markby and F. A. Glover, *Judges.*

Land disputes—Right of defence.

Queen versus Sachee alias Sachee Boler.

Committed by the Magistrate, and tried by the Sessions Judge of Chittagong, on a charge of culpable homicide not amounting to murder, &c.

Where A is in actual peaceable possession of land, B's attempt to recover possession of it by force is an illegal act, which A has a right to resist. If B uses force in carrying out his attempt, A has a right to oppose force to force, and to inflict upon B such injury as is necessary to compel him to desist.

Markby, J.—IN this case the prisoner has been convicted of voluntarily causing grievous hurt, and sentenced to five years' rigorous

imprisonment, and has appealed to this Court.

It appears that there were three brothers, Bakur Ally, Hyder Ally, and Suffer Ally, who inherited from their father a right of occupancy in certain land, and which, after their father's death, they divided into three shares, and held separately. The prisoner purchased the shares of Bakur and Hyder, and took possession soon after. However, he re-let to Hyder his share, remaining in possession of Bakur's share. Subsequently (as the Judge finds) "the prisoner either truly or falsely gave out that he had obtained from the zemindars a talook lease for the land on which stood Suffer's *theeta*, and because Suffer refused to give him a fresh talook-*leut* as talookdar, the prisoner took possession of this share also.

Suffer, upon this, appears to have laid a complaint before the Magistrate, which, however, he failed to substantiate. Suffer in the meantime took up his quarters elsewhere in the village, and 15 days after he had ceased to be in possession, an attempt was made to settle the matter by reference to the neighbours, who accordingly met to hear and determine the question at the house of one Ahsaud Mullah.

Before the proceedings at Ahsaud Mullah's house had commenced, Suffer proposed an adjournment to the spot where the land in dispute was situated. The prisoner opposed this; but Suffer and his brother Bakur left the house of Ahsaud Mullah, the former declaring his intention to go and take possession of the disputed land. The prisoner also then left, and, passing the other two, was the first to reach the spot in question. There is evidence uncontradicted that, when Suffer and Bakur left Ahsaud Mullah's house, they had sticks in their hands, but that the prisoner had none.

It is very difficult to say exactly what was the nature of the affray which took place when the parties met at or near the land in dispute, and which is the origin of these proceedings. We have against the prisoner the account of Bakur, who was present and took part in it, and of Hyder who witnessed it from a distance; but we do not think that any reliance can be placed on their testimony, which is obviously exaggerated, and given with considerable acrimony against the prisoner. What is certain is that Bakur, Suffer, and the prisoner, were each wounded:

Bakur and the prisoner slightly; Suffer, as Vol. VII it afterwards turned out, severely; and there is no reasonable doubt that the affray arose from Suffer and Bakur attempting to take forcible possession of the land in dispute, which the prisoner forcibly resisted.

Both Suffer and the prisoner complained to the police; but it does not appear that any notice was taken of the matter.

Nothing more was heard of the case for about 14 days, when a policeman brought Suffer to the first witness, a native Medical Officer in charge of the Dispensary. He says that he at first thought nothing serious would result from the wound; that the prisoner could walk, though apparently weak and exhausted from insufficient food. On the evening of the following day, however, Suffer became drowsy, and unwilling to speak, and on the day after that he died. A *post mortem* examination shewed that the cause of death was inflammation of that part of the brain situated immediately beneath the wound from which the Doctor inferred that the inflammation was caused by the wound. The Doctor describes the wound as a severe one, but the skull was not fractured.

The main question which will have to be considered in this case is, whether the prisoner was justified, under the circumstances, in striking Suffer any blow at all; but, before coming to this, it may be as well to premise that we do not consider that there is any evidence that, assuming the prisoner had a right to use force at all, any more force was used than was necessary, although, according to the medical testimony, death was the result of the blow. It does not appear to have been at all more severe than a man attacked by two others would have a right to inflict.

Whether or no the right of possession in this land was in Suffer or not, has not been determined. But the prisoner was, at the time of the affray, in actual peaceable possession of it, and had been so for 15 days; and the act of Suffer, in attempting to recover possession by force, was clearly illegal. But more than this, we think the act was one which the prisoner had a right to resist; and if (as we think was the case) Suffer used force in carrying out his intention, then we think the prisoner had a right to oppose force to force, and to inflict upon Suffer such injury as was necessary to compel him to desist.

Vol. VII. We do not consider it necessary in this case to take any measures for making further enquiry upon the question whether or no the real title was in Suffer or the prisoner; because we think that the prisoner having been 15 days in continuous peaceable possession, it must be presumed that his possession was lawful. What would have been the consequence if it had been shown on the part of the prosecution that the real title to the property was in Suffer, it is not necessary to say, though we should even then have grave doubts, whether, looking to the length of time during which the prisoner had been in possession, and to the circumstances that Suffer had expressly agreed to submit his right to recover possession to arbitration, the prisoner would not have been justified in resisting the forcible entry which Suffer attempted to make. We do not, however, express any opinion on this point. We are satisfied that in this case the facts proved are not sufficient to establish any crime against the prisoner, and we therefore reverse the Judge's decision. We annul the sentence passed upon the prisoner, and we order him to be discharged.

The 29th May 1867.

Present :

The Hon'ble A. G. Macpherson, *Judge*.

Evidence—Depositions.

Queen versus Bheekun Doss.

Committed by the Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of voluntarily causing grievous hurt in committing robbery.

When a deposition is received in evidence under Section 369, Code of Criminal Procedure, at a trial before a Sessions Judge, there ought to be on the record distinct proof of the existence of such a state of things as makes the deposition legal evidence.

I dismiss this appeal.

There is ample evidence to support the conviction. The only point on which I have had any doubts is that the deposition given by the prosecutor before the Magistrate was, in the prosecutor's absence, received at the

trial before the Sessions Judge as evidence against the prisoner, without there, in fact, being any proof of any real attempt having been made to produce the prosecutor or to account for his absence, and without any proof that the deposition was taken in the prisoner's presence. If it were not that the case was well established quite independently of this deposition, I should have considered the receiving of the deposition in this manner a fatal objection to the proceedings. As it is, I dismiss the appeal; but I have to remark that, when a deposition is received in evidence, under Section 369 of the Criminal Procedure Code, at the trial before the Sessions Judge, there ought to be on the record distinct proof of the existence of such a state of things as makes the deposition legal evidence.

The 30th May 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Tender of Pardon.

*In the matter of Nistarinee Debia,
Petitioner.*

A Sessions Judge is not competent, before a trial, to instruct a Magistrate to tender a pardon under Section 210 of the Penal Code.

Kemp, J. The prayer of the petitioner to be permitted to appear at the Sessions Court through her agent is wholly inadmissible.

With reference to the other points raised in this petition, we think that a Sessions Judge is competent in trials, whether conducted with a jury or with the assistance of Assessors, to instruct a Magistrate to tender a pardon under Section 210 of the Code of Criminal Procedure. This, we think, is clear from the wording of Section 400; but it must, we think, be done at the time of trial, and, therefore, a Sessions Judge is not, in our opinion, competent before the trial to instruct a Magistrate to tender a pardon under Section 210.

RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 1st June 1867.

Present :

The Hon'ble W. S. Seton-Karr and F. A.
Glover, *Judges.*

Criminal Breach of Trust.

Queen *versus* Banee Madhub Ghose.

*Committed by the Magistrate, and tried by
the Sessions Judge of Beerbhoom, on a
charge of criminal breach of trust.*

Where a Court Inspector improperly delegated to a constable the custody, &c., of Government monies (taking from him private security to save himself from loss in case of defalcation), and the constable dishonestly converted the money to his own use, although he afterwards restored it, the case was held to fall under Section 408, and not Section 409, of the Penal Code, and the sentence reduced from 10 years' transportation and a fine of 500 Rs. to one year's rigorous imprisonment without fine.

Seton-Karr, J. THERE is no doubt that the prisoner, who was a head constable of the Beerbhoom Police, has been guilty of criminal breach of trust under one or other of Sections 405, 406, 408, or 409. He has been convicted under the last Section. The guilt is proved from the evidence and from the prisoner's own admission. The pleader for the appellant very wisely confines himself to an argument in favor of mitigation of the sentence.

On what grounds the Sessions Judge thought fit to sentence the prisoner to such a terrible punishment as 10 years' transportation and a fine of 500 rupees, I am wholly at a loss to discover.

The prisoner was a constable drawing 10 rupees a month, and he had been entrusted by the Court Inspector, the main witness

in the case, with the keeping of monies received on divers accounts as specified, with the accounts relative to the same, and with the transmission of the monies, either to the Collectorate, or to the parties entitled to receive it. **Vol. VIII.**

This trust was delegated by the Court Inspector of his own authority and responsibility, without the sanction of the Magistrate and without his knowledge.

Of course, it is not to be wondered at that, under the lax system thus improperly introduced, the money was embezzled on several occasions: and it seems that a sum of 1,000 rupees was unaccounted for, whereof nearly two-thirds were at once, on enquiry, made good by the Court Inspector himself, and rather more than one-third by the prisoner.

The Judge very properly makes some severe remarks on this laxity; he holds that the Court Inspector is unfit for his appointment, but he then passes this extreme sentence on the guilty but unfortunate prisoner, the constable.

I am decidedly of opinion that the offence of which the prisoner has been found guilty under such circumstances will be suitably punished by a sentence of one year's rigorous imprisonment without any fine.

Let the case go to a second Judge.

Glover, J. I concur with Mr. Justice Seton-Karr in reducing the sentence to one year's rigorous imprisonment.

But I think that the prisoner ought not to have been convicted under Section 409 of the Penal Code at all. That Section, so far as regards the present case, applies to persons entrusted with dominion over property in the capacity of public servants, and it appears to me that the prisoner was not so entrusted. The Court Inspector was the party responsible for the money, and he had no authority, as he himself admits, to delegate his power to others, or to make any other public servant, whom he chose to make the depositary for the time being responsible as such.

Vol. VIII. Indeed, from the Court Inspector's evidence, it is clear that he did not look upon the head constable as employed in a public capacity when he entrusted him with the Government monies, for he took private security from him to save himself from loss in case of defalcation.

If, then, the prisoner was not entrusted with the money as a public servant, Section 409 will not apply.

But there is no doubt that the prisoner was entrusted as a private individual with monies by the Court Inspector, which, instead of paying into the Collectorate, he dishonestly converted to his own use, although he afterwards restored them, and Section 408 would, therefore, apply to his case, the constable being employed by the Court Inspector to collect and pay over the money deposited in his hands, and being, for that purpose, his servant under a special trust.

The limit of punishment under that Section is seven years' imprisonment with fine; but taking the many circumstances of extenuation in this case into consideration, I concur with my learned colleague that one year's rigorous imprisonment is a sufficient punishment.

Seton-Karr, J.—I concur in holding that the commitment should be under Section 408 of the Penal Code.

—
The 3rd June 1867.

Present :

The Hon'ble J. P. Norman and W. S.
Seton-Karr, *Judges.*

Transportation (in lieu of Imprisonment).

Queen versus Gour Chunder Roy.

*Committed by the Magistrate, and tried by
the Officiating Sessions Judge of Jessore,
on a charge of false evidence, &c.*

Under Section 59 of the Penal Code, no sentence of transportation for a shorter period than 7 years can be passed on any charge.

Therefore, where a prisoner was convicted on separate charges of giving false evidence in a judicial proceeding under Section 193 and of forgery under Section 467, and sentenced to seven years' transportation for the first offence, and a further period of transportation for 3 years for the second offence, the second sentence was quashed as illegal.

Norman, J.—THE appellant objects, amongst other things, that the Sessions Judge was wrong in comparing the hand-writing of the signature of Degumber Roy in the receipts with the signature as appearing in the kubala marked A, inasmuch as that kubala was not an undisputed and admitted document. I may admit that the Sessions Judge so describes A. But I will, for the moment, assume that he was wrong that the signature was not an undisputed signature.

It will come to this that the comparison of hand-writing was only one out of many proofs in which the Sessions Judge bases his conclusions.

The case has been most fully and carefully tried, and there is no ground for questioning the correctness of the Sessions Judge's finding.

As regards the sentence, the prisoner has been convicted on two charges, *viz.*, one under Section 193 of the Indian Penal Code, of giving false evidence in a judicial proceeding; and one under Section 467 of the forgery of a receipt; for each of which offences he was liable to imprisonment for seven years.

The Judge has sentenced him to transportation for 10 years, *viz.*, seven years on the first charge, and a further period of three years on the second charge.

According to the construction which has been put upon Section 59 by several decisions of the High Court—*see 2 Weekly Reporter, page 1; 5 Weekly Reporter, page 44, Criminal Rulings*—the correctness of which I do not question, no sentence of transportation for a shorter period than seven years can be passed in any case. The words "in every case" in Section 59 have been construed as "on any charge" or "for any offence;" therefore the sentence of three years' transportation on the second charge in the present case cannot stand.

It appears desirable that sentences in cases like the present should be homoge-

neous. It would seem to be likely to lead to some public inconvenience if, by the force of the sentence, and not at the will of the Government, a part of the sentence on a prisoner must be worked out at one place, and the residue in another.

There are many cases when prisoners may be convicted on two charges, each being of offences for which the offender is liable to transportation when the magnitude of an offence may imperatively call for a sentence of seven years' transportation, but where a further sentence of seven years on the second offence would be too severe a punishment.

In the present instance I would quash the second sentence as illegal. As the two offences in which the prisoner has been convicted are mixed up together, I do not think it necessary to pass any sentence of imprisonment or substitution for such illegal sentence.

The prisoner will, therefore, be transported for seven years, instead of ten.

Selon-Karr, J.—I concur in the reduction of the sentence as proposed.

The 3rd June 1867.

Present :

The Hon'ble F. A. Glover and C. P. Hobhouse, *Judges.*

Kidnapping—Punishment.

Queen versus Mussamut Bhodeea.

Committed by the Magistrate, and tried by the Sessions Judge of Patna on a charge of kidnapping.

The maximum sentence prescribed for the offence of kidnapping should only be awarded in a case of the most aggravated nature.

Glover, J.—No point of law is raised in this appeal. The question was one of evidence, and the jury were left to decide whose story was the true one. On that evidence, they found the prisoner guilty, and there is no ground for interfering with their verdict.

But I think the sentence of seven years' transportation too severe, and, under the circumstances, would reduce it to five years' rigorous imprisonment.

Hobhouse, J.—I concur. I observe that imprisonment for seven years, convertible to transportation for a like period under Section 59, is the maximum sentence which the law prescribes for the offence of kidnapping under Section 363.

I would, therefore, hold that this maximum sentence should only be awarded in a case of the most aggravated nature of the kind contemplated.

But here there are no circumstances of an aggravated nature disclosed; but, on the contrary, there was some temptation to commit the offence offered by the carelessness of the child's natural guardian, and the offender was clearly not a hardened criminal, for she at once and penitently admitted her guilt.

The 3rd June 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Rioting with deadly weapons.

Queen versus Moorut Mahton and others.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of being members of an unlawful assembly.

In a case of rioting with deadly weapons, the side found guilty of using them and causing grievous hurt are properly punishable more severely than the men of the other side.

Glover, J.—THE evidence in this case was fully laid before the jury. They were

Vol. VIII. told that a party in peaceable possession of lands, and attacked by others in force, would be justified in resisting, if they had no time to apply for the protection of the authorities, and if they used no greater violence than was necessary; and they were further told to apply the evidence to these points. There can be no doubt, we think, that this was the proper way to put the case to the Jury.

Mr. Twidale for the Sohra people contends that, as the Jury found both sides guilty of rioting, the Judge should have inflicted the same punishment. But the Sohra people were, in addition to the offence of rioting with deadly weapons, found guilty of using them, and of causing grievous hurt, and were, therefore, properly punished more severely than the men of the other side. In any case, this would not be a point of law on which an appeal lies.

The petition is rejected.

The 3rd June 1867.

Present :

The Hon'ble L. S. Jackson and C. P.
Hobhouse, *Judges.*

Abkarry Licenses.

Criminal Revisional Jurisdiction.

Reference under Section 434, Act XXI. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Queen versus Ram Kishen.

Under Section 43, Act XXI. of 1856, only persons holding licenses, and not their servants, are subject to the penalties specified in the Section.

Jackson, J.—We think that the Sessions Judge is right in the view he has taken, and that, under the 43rd Section, Act XXI. of 1856, only persons holding licenses, and not their servants, are subject to the penalties specified in the Section. We, therefore, order that the conviction of the parties named be set aside, and that the fines, if levied, be returned to them.

The 3rd June 1867.

Present :

The Hon'ble L. S. Jackson, and C. P.
Hobhouse, *Judges.*

Witnesses (Summoning of).

Criminal Revisional Jurisdiction.

Revision of the proceedings under Section 404, Code of Criminal Procedure.

Queen versus Meer Zakir Ally.

In the case of a charge of an offence triable by the Court of Session alone, the Magistrate is bound to summon the complainant's witnesses.

Jackson, J.—It appears to me that the petitioner is entitled to a precept directing the Magistrate to pass orders on the petition, dated 20th March, in which the petitioner prayed that his witness might be summoned.

The complaint was laid on the 12th, and the day for hearing was the 20th, on which day the complainant made his further application, and the Magistrate might thereon have made an order under Section 262, Criminal Procedure Code, in satisfying himself by the oath of complainant that the witnesses were material, and would not appear voluntarily.

Instead of doing so, he remarked that the complainant was not prepared to prove his case.

He does not say that he considered the petitioner to have unduly delayed the application for a summons; and, looking at the circumstances, I cannot say there was such delay. I am, therefore, of opinion that the order dismissing the complaint should be set aside, and the Magistrate required to proceed with the case.

Hobhouse, J.—The charge was in this instance a charge of the offence of mischief by destroying a valuable security, to wit, an ikrar under Section 477, Indian Penal Code.

This is a charge of an offence triable by the Court of Session alone.

Therefore, under Section 186 of the Criminal Procedure Code, the Magistrate was bound to summon complainant's witnesses. He refused to do so.

Under these circumstances, I concur in the order my brother Jackson would pass.

The 4th June 1867.

Present :

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges.*

False Evidence—Abetment.

Queen *versus* Chundi Churn Nauth and
another.

*Committed by the Magistrate, and tried by
the Sessions Judge of Mymensing, on a
charge of false evidence.*

Where C falsely represented himself to be U, and the writer of a document signed by U, and T, knowing that C was not U, and had not written such document, adduced C as U and as the writer of that document HELD that T ought to have been convicted on a charge of abetting the giving of false evidence.

Hobhouse, J. In this case the evidence on record clearly proves, and the Assessors and the Judge below have found these facts, *viz.*, that the prisoner, appellant, Chundi Churn Nauth, falsely represented himself to be Uday Chand Nauth; that, so falsely representing himself, he further falsely swore that he wrote a certain document, and that the prisoner, Tarifat Beopari, knowing that Chundi Churn was not Uday, and that Chundi Churn had not written the said document, adduced Chundi Churn as Uday Chand and as the person who had written the said document.

On the finding of facts the Court below found Chundi Churn guilty of intentionally giving false evidence in a judicial proceeding, and found Tarifat guilty of corruptly using as genuine evidence he knew to be false, and under the provisions of Section 293 and, Section 196, Indian Penal Code, respectively, sentenced each of the prisoners to 3 months' rigorous imprisonment.

The finding against the prisoner Chundi Churn is good in law and in fact, and the sentences on both the prisoners are appropriate, and so with these sentences, and in this finding I would not interfere. But the finding on the prisoner Tarifat is, in my judgment, incorrect in law.

The word "evidence" cannot, in my judgment, be strained to include an individual, and it cannot therefore be said that Tarifat used Chundi Churn corruptly as "evidence true and genuine which he knew to be false and fabricated." The offence of Tarifat was that of abetting the offence of Chundi Churn, and he should have been found guilty of that offence under Section 193 read with Section

109, Indian Penal Code, and then sentenced under these Sections to 3 months' rigorous imprisonment. **Vol. VIII.**

The Judge should amend the conviction in accordance with these remarks.

Jackson, J. The phraseology employed was not the best possible description of Tarifat's offence, and I agree that it would have been better to convict him on a charge of abetting the giving of false evidence. But I am inclined to think that the charge may stand as it is. The Judge probably did not mean that Tarifat had used Chundi Churn as false evidence, but had used the evidence which Chundi Churn gave. That evidence being false, and Tarifat knowing it to be false, and as placing Chundi Churn in the box, and causing him to give evidence, was, in fact, using the evidence which he gave, however unsuccessfully, although the expression is not happy, and the other charge would have been preferable. I should suggest that it be allowed to stand, but that the proper charge be pointed out.

Hobhouse, J. Very well. I think the Judge may have intended what Mr. Justice Jackson suggests. So the conviction may stand, but the Judge should be informed that the more proper charge was that pointed out by me.

The appeal is dismissed.

The 4th June 1867.

Present :

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges.*

**Erroneous orders—Dismissal of complaint—
Application by complainant for adjournment.**

Criminal Revisional Jurisdiction.

Queen *versus* Ramnarain Ghose.

Revised under Section 404, Code of Criminal Procedure.

The Deputy Magistrate adjourned the case to the 21st, on which day he ordered the case to be dismissed for non-attendance of the complainant, but on the following day cancelled that order and revived the case on the ground of his having dismissed the case by mistake in ignorance of the complainant having petitioned for an adjournment by reason of sickness. The Magistrate on appeal reversed the order of the Deputy Magistrate. As the order of the Deputy Magistrate was manifestly wrong, the High Court set aside the whole of the proceedings, and restored the case to the position in which it stood before the 21st.

Vol. VIII. Jackson, J.—BABOO Otool Chunder Mookerjee appears to show cause, and relies upon a case referred to in the note on Section 259, Prinsep's Criminal Procedure Code. The report of that case is not before us (461 of 1859); but it seems to have been held that a case dismissed under the Sections referred to cannot be revived; it is therefore contended that, although the Magistrate had clearly no authority to make the order before us, yet, as it merely had the effect of setting aside an illegal order of the Deputy Magistrate, this Court ought not to interfere.

The circumstances of the case are these: The complainant preferred a charge of criminal trespass and hurt, which a Deputy Magistrate proceeded to try, under the Procedure Code, Chapter XV. The complainant and his witnesses attended, and their evidence was recorded; but, owing to the absence of the defendant, the case was not completed. The Deputy Magistrate then went away on leave, and was succeeded by another officer, who, taking up the case, observed that he could not decide upon evidence recorded by his predecessor, and ordered the attendance of the parties *de novo* on the 7th January. On that day and the two following days, the Deputy Magistrate records that he was disabled by sickness from hearing the case, and he adjourned it to the 21st. On that day, he ordered the case to be dismissed, the complainant being absent. On the next day, 22nd, he passed a further order, stating that the case had been dismissed in mistake, as the complainant had previously filed a petition for adjournment by reason of his sickness, a fact of which the Deputy Magistrate had not been aware, and he revived the case. Against this order the defendant appealed to the Magistrate, who, it would seem consciously without jurisdiction, reversed the order, and the complainant is now before us. In the state of facts which we have described, it would be a clear denial of justice to allow the complainant's case to be lost on account of the Deputy Magistrate's order of the 21st. We do not wish now to decide the point whether the Deputy Magistrate was competent under the circumstances to review or to withdraw his own order of the 21st. But, as that order was in itself manifestly wrong while the complainant had a petition before him for adjournment, we think it proper to rescind and set aside the whole of those proceedings, and to restore the case to the

position in which it stood before the 21st January.

We, therefore, direct the Deputy Magistrate to re-place the case upon his files, and proceed with it according to law; and, looking to the defendant's conduct, we think it right that the petitioner should have his costs.

The 4th June 1867.

Present:

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges*.

**Breach of Contract—Act XIII. of 1859—
Coolies in Assam.**

Criminal Revisional Jurisdiction.

*References under Section 424, Code of
Criminal Procedure.*

*Queen versus Gaub Gorah Cacharee and
others.*

Coolies in Assam, who have received advances in contemplation of work to be done, may be proceeded against under Act XIII. of 1859.

Jackson, J.—We think there is nothing in the terms of Act XIII. of 1859 to support the view taken by the Judicial Commissioner.

It appears to us that the Legislature, in taking measures for the protection of employées who have made advances of money in contemplation of work to be done, advisedly employed the widest terms to designate the person receiving such advance: in using the words artificer, workman, or laborer, they evidently intended to include labor, as well unskilled as skilled, and in extending or making it legal to extend the operation of the Act to a region like Assam, where labor would be chiefly agricultural or out door labor, they doubtless had in view the common cooly, whose services it is necessary there to secure by an advance.

We do not quite understand what is meant by the Judicial Commissioner's expression "work of a specific character;" but the 4th Section of the Act provides that the contract to be enforced may be for a term certain, or for special work or otherwise.

Probably, the work of a garden-cooly is something well understood in Assam, and the work would, in that case, be of a specific kind, even if that were necessary.

We are of opinion that the Deputy Commissioner was competent to summon the coolies complained of, and to make an order under the 2nd and 3rd Sections of the Act.

The 5th June 1867.

Present:

The Hon'ble F. B. Kemp, W. S. Seton-Karr, and F. A. Glover, *Judges.*

False Evidence (by Ryots).

Queen versus Dhurrani Dutt Rai and another.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Tihool, on a charge of false evidence.

Discussion as to the extent of punishment to be passed upon certain ryots who, in a case of criminal trespass brought by an indigo planter, falsely swore that cotton, and not indigo, had been raised on the land in question during the past year. Punishment reduced. *Seton-Karr, J.*, would have reduced the punishment still more for reasons given.

Seton-Karr, J. THESE two appellants have been convicted of giving false evidence under Section 193, in that when they were witnesses for the defence in a case of trespass brought on behalf of the Pandoul Factory against certain ryots, they swore that no indigo had been grown on the land which formed the subject of suit, and that cotton had been grown thereon.

It seems impossible to doubt from the evidence of Mr. Gale, of Mr. Forbes, of Mr. Lamb, and of the jemadar of the factory, that this land was sown with indigo last year, and that the evidence of the prisoners to the contrary effect in the trespass case was not correct. Stumps of indigo were seen on the land, which could only have been grown last year; and, altogether, looking at the defence of one of the prisoners in the Sessions and at the whole details, there can be no doubt that the evidence given on the side of the factory was correct, and that the depositions of the prisoners in the trespass case were knowingly false.

But while I have no doubt that the conviction should be upheld, I have just as little that the amount of punishment is quite disproportionate to the offence, and that it ought to be materially reduced. My only doubt has been to what extent the excessive sentence of four years, passed by the Sessions Judge, ought to be reduced, and on this point I have conferred with several of my colleagues.

It is necessary to examine narrowly the facts proved in this case, and I may observe that they have had my earnest and repeated consideration.

The original case was an ordinary case of trespass brought against two men in respect

of 25 cottahs of indigo stated to be grown for the factory by one Shib Dyal, and the two defendants charged with trespass were said to have been instigated by this Shib Dyal to plough up the land, and to sow cotton on it, in order to injure or annoy the planter. The question was treated by the Magistrate, who tried the trespass case, simply as one of possession. The Magistrate remarked that it was very unusual that such land should have been in possession of the factory; but being bound by the evidence, which appeared very strong for the factory, and contradictory and full of falsehoods for the defence, the Magistrate, after an examination of the spot where he found indigo stumps actually in existence, sentenced the two defendants to four weeks' imprisonment, under Section 447 of the Penal Code (criminal trespass).

So far there was nothing whatever remarkable in the case of trespass. It was not a case where large bodies of men entered with violence on lands belonging to the factory. The amount of land in dispute was very trifling, and the case does not appear to have been invested with unusual importance, or to have been remarkable as a precedent, or on any other ground.

As regards the conduct of the two prisoners now on appeal before us, they were witnesses for the defence.

Lal Dhari, the first prisoner, clearly knew the land pretty well, and he deposed in the said trespass case to the effect that during the last 10 years indigo had been only twice grown in the land, but that this was eight years ago; and that last year there was no indigo on this land, and no indigo stumps to be seen now.

The evidence of Dhurrani Dutt Rai, the other appellant, was less positive when he delivered what has now been found, and rightly found, to be a false statement. He says, after deposing that the land belonged to the defendant for whom he was called, "I cannot say whether there were indigo stumps on the land or not. I saw the land last year. I have seen it in Aghran, Pous, Magh, up to the present year." And, then, again, "Cotton was sown in Phalgun last. I did not see what crop there was on the land before that; I did not see what there was on this land in Aghran this year. It was prepared for millet in Aghran," &c., &c.

Still, the effect of this testimony was adverse to the factory, and it was unquestionably false.

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Vol. VIII. The defence in the Sessions Court of Lal Dhari is that, on the land in question, there was cotton for three years, then cereals for a year, and then *indigo*.

Dhurrani Dutt's defence is that in 1271 and 1272 there was cotton on the lands; that indigo was sown there in 1273 by the *hukura* and *zillahdars* who rooted out the cotton; and that he *deposed incorrectly before the Magistrate*.

This last statement seems to me very like an admission of guilt, and made as if the prisoner threw himself on the mercy of the Court, and allowed that he had spoken falsely to the prejudice of the factory.

The Judge, with whom both Assessors concurred as to the guilt of the prisoners, says that he punishes them "severely as they deserve." But for *this severity he gives no grounds whatever*; neither, as I have shown, are any to be gathered from the complexion or from the minutest details of the original trespass case.

The case was an ordinary suit in which a planter complained that two men were, to use his own words, "ploughing up my *ziraat* land with the intention of annoying me."

It is, however, notorious that in this very concern of Pandoul in Tirhoot, in which this case originated, party feeling lately ran very high between planter and ryot, and that the villagers had sided with their own men. (Of course, this party feeling would be no justification, either of acts of violence by any party, or of that fraud and falsehood by which acts of violence might either be supplemented or be met. And it might *possibly* lie in the mouths of the local authorities, charged with the maintenance of the public peace and with the security of property in a populous and extensive district, to say, as a reason for a sentence more severe than usual, that an example was necessary, and that severe punishment, where detection had followed rapidly on crime, was essential to important interests, and was, in the end, the truest mercy and the best policy. *But not one such consideration as the above is to be gathered from any part of the record.* The prisoners have been punished with very nearly fifty times the amount of punishment that the original trespassers received, though, of course, I do not mean to place criminal trespass and false evidence in the same category as crimes.

The punishment should have been made appropriate to the magnitude of the inter-

ests and the kind of the false evidence: I mean that our Court has invariably made a distinction between different kinds of false evidence, and we have never awarded the same punishment to the man who falsely swears away the life or liberty of another, and to the man who, on oath, merely denies his relationship to the plaintiff or defendant. Agriculturists should not have been allowed to leave the Court, as they must have done in this case, with the impression that they were punished with extra severity, simply because their opponents were European gentlemen, who, as was legal and proper, were bent on protecting their own land from injury, not by meeting one offence by another, but by resort to the local tribunals, which, in this case, gave them ample and speedy redress.

I cannot think that, if this false evidence had been spoken in a suit where a native was complainant, and which related to a small plot of land, the punishment for such false evidence would have extended to four years; and why this excessive amount should have been awarded because English gentlemen were concerned, I am, as already observed, wholly unable to discover from any single thing on record. Therefore, after giving the subject the very fullest consideration, I am of opinion that Lal Dhari's punishment should be reduced to one-fourth of the original sentence, or to twelve months' rigorous imprisonment, and that of Dhurrani Dutt's to nine months', in consideration of the less positive nature of his testimony, and, as I read his defence, of his throwing himself on the mercy of the Court.

But this is the maximum which the offence deserves, or to which I can consent.

Glover, J. This case has been referred to me on the question of punishment.

I cannot go so far as my learned colleague proposes. Both the prisoners were most clearly guilty of perjury on a point about which they could have had no doubt.

Giving them the benefit of all extenuating circumstances, it would, in my opinion, be as unjust to the planter to let these men off with what, to my mind, is a disproportionate punishment as it would be to the accused to punish them with exceptional harshness, because the prosecutor chanced to be a European.

At the same time I see no reason for the particular severity with which the Sessions Judge has visited them.

I would reduce the sentence to two years and 18 months' rigorous punishment respectively.

Kemp, J.—I have read the whole of the proceedings in this case, both before the Assistant Magistrate and the Sessions Judge.

I consider this to be a case in which the prisoners knowingly and wilfully deposed falsely. The two prisoners live in the village in which the disputed land is situated, and they knew perfectly well what crop was grown last year in that particular field; so that, when they deliberately stated that cotton, and not indigo, had been raised on that land last year, they were deposing to facts which, they well knew, were wholly false.

After giving false evidence in the original case of criminal trespass, when called upon, after the witnesses for the prosecution had been examined, to state what they had to say in their defence, they both deliberately adhered to their false story.

Before the Sessions Judge they varied their statement, but even in that Court there was no frank admission of guilt.

The Assessors, two Hindoo gentlemen, were of opinion that the prisoners were guilty, and the witnesses examined for the defence of the prisoner Lal Dhari Rai actually supported the case for the prosecution.

If parties, guilty of such wilful perjury, are not severely punished, it may be that the planter, who, as in this instance, instead of resorting to force, sought the protection of the law, might leave our Court with the idea that the prisoners were tried with unusual lenity, because the prosecutor was an indigo-planter. The ryot, on the other hand, would go back to his village after a few months' imprisonment, and tell his neighbours that perjury, if directed against the interest of an indigo-planter, was not considered by the Court to be a grave offence.

The question at issue between the planter and the ryot, in the criminal trespass case brought by the manager of the factory, was not so much whether indigo or cotton was grown on the small patch of land which formed the subject of dispute, as whether the land were the ziraat lands of the factory, or were in the possession and cultivation of the ryots. The question was of the great-

est importance to the planter, for on the result depended the fate of many other cases, and probably involved the closing of the factory had the ryots succeeded in proving their occupation. With deference to the very great experience in matters connected with indigo-disputes, undoubtedly possessed by my learned brother, Mr. Justice Seton-Karr, I cannot concur in the sentence proposed by him for so grave an offence.

Had the case come before me in the first instance, I should have confirmed the original sentence as against the prisoner Lal Dhari Rai, and mitigated it as against the other prisoner whose guilt is not, in my opinion, so grave. As it is, I do not object to the sentences proposed by Mr. Justice Glover.

The 6th June 1867.

Present.

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Jurisdiction—Irregularity—False Evidence.

Queen versus Doorga Nath Roy and another.

Committed by the Magistrate, and tried by the Sessions Judge of Mymensing, on a charge of corruptly using, or attempting to use, as genuine evidence, a document knowing it to be false and fabricated.

Although a Civil Court acted irregularly in sending to the Magistrate for investigation a case of using or attempting to use false evidence when no suit was pending in that Court, yet, as the Court had given its sanction to the prosecution of the offence—**HELD** that it was in the competency of the Magistrate, under Section 68 of the Code of Criminal Procedure, even without a charge or complaint, to proceed to investigate, and, if necessary, to commit for trial to the Sessions Court.

Vol. VIII. *Kemp, 7.*—THESE two prisoners have been convicted of the offence of using, as genuine, evidence which they knew to be false and fabricated.

The circumstances of the case are somewhat peculiar. The prisoner Doorga Nath Roy, who is a mooktear practising in the Courts of Zillah Mymensing, was employed with others as an attorney to conduct a suit under Act X. of 1859 in the Collector's Court. A sum of Rs. 150 as fees was due to the mooktears engaged, but not to the prisoner alone. In the decretal order, these fees were made payable to Kali Nath Nundee; Doorga Nath's name, though he certainly appears to have been the most active agent in conducting the suit to a successful issue, was not mentioned.

Subsequently, Doorga Nath, associating with himself as co-plaintiff, the other prisoner, Pearcee Mohun Shaha, to whose master the prisoner Doorga Nath was indebted, brought an action in the Court of the Additional Moonsiff of Mymensing for the recovery of these fees. It was arranged that Pearcee Mohun was to find the funds for carrying on the suit, and to receive 6 annas of the amount recorded, which was to go to pay off the debt of Doorga Nath to Pearcee Mohun's employer. The name of Kali Nath Nundee, which appeared in the copy granted by the Collectorate Amlah of the original decree in the Act X. suit, was partially erased, that is to say, the Kali and the Nundee were struck out, and Doorga and Roy inserted, leaving the original Nath. The suit in the Moonsiff's Court was ready for hearing, and it is clear that it would have been a defended suit. Doorga Nath, apprehensive that the erasure in the copy of the decree under Act X., upon which document the suit was based, would be detected, attempted, in the first instance, to obtain the permission of the Additional Moonsiff to withdraw from the suit with leave to bring a fresh one under the provisions of Section 97 of Act VIII. of 1859. The Additional Moonsiff, for grounds which do not appear on the record, refused his permission, when Doorga Nath applied to have the suit dismissed as compromised, and the suit was accordingly dismissed.

On the same day it was brought to the notice of the Moonsiff that the copy of the decree under Act X. had been tampered with. An enquiry was instituted, which resulted in the Moonsiff sending the case for investigation to the Magistrate, who eventual-

ly committed the two prisoners to take their trial before the Sessions Court. Mr. Doyne, who has been heard for the prisoner Doorga Nath Roy, contends that the committal is illegal, inasmuch as no case was pending in the Court of the Additional Moonsiff when it appeared to that Court that the prisoner had been guilty of the offence described in Sections 193 and 196 of the Indian Penal Code, and that, under Section 16, Act XXIII. of 1861, it is only when a case is actually pending before the Civil Court that the Court is competent either to commit the offender to take his trial before the Sessions Court, or, after making such preliminary enquiry as may be necessary, to send the case for investigation to any Magistrate who shall thereupon proceed according to law.

We are of opinion that the Additional Moonsiff acted irregularly in sending this case for investigation to the Magistrate, as it was not then pending before him; but, as he gave his sanction to the prosecutor which is necessary in offences provided for in Chapter XI. of the Code of Criminal Procedure before the Magistrate could take cognizance of the offence, it was in the competency of the Magistrate, under Section 68 of the said Code, even without a charge or complaint, to proceed to investigate and, if necessary, to commit for trial to the Sessions Court.

On the merits of the case, after reading the evidence, it appears to us clear that the prisoner Doorga Nath, with the fraudulent intent, erased the name of Kali Nath Nundee and substituted his own, for the purpose of obtaining a decree for the whole amount of the fees to which he was only entitled in part. The other prisoner, Pearcee Mohun, though he wittingly acted as Doorga Nath's too, his guilt is by no means so grave.

The sentence upon Doorga Nath of five years' rigorous imprisonment appears to us to be too severe. We think that a sentence of two years' rigorous imprisonment will meet the justice of the case, and be sufficient as an example. The sentence passed upon Pearcee Mohun of six months' rigorous imprisonment may stand.

The 8th June 1867.

Present :

The Hon'ble W. S. Seton-Karr and A. G.
Macpherson, *Judges*.

Using forged Document.

Queen versus Hatim Moonshee alias Mahomed Hatim.

Committed by the Magistrate, and tried by the Sessions Judge of Tipperah, on a charge of forgery, &c.

Where an intention to use a forged document, if necessary, was inferred from the facts of the case and from the conduct of the prisoner.

Seton-Karr, J. We have considered his case together, and we think that the Judge was justified in differing from the Assessors and in convicting the prisoner.

The prisoner, from the evidence which the Judge credits, and which we see no reason to doubt, looking at the prisoner's own account of the transaction, appears, pending a certain case in which he had been sued, to have produced a *kabin* before certain witnesses, which *kabin* was full of blots and erasures, and subsequently to have produced another *kabin* without blots or erasures to the Deputy Magistrate in whose Court he had been summoned as defendant in the case alluded to, which was one of criminal breach of trust.

He has been convicted of forging a valuable security under Section 467, and of being possessed of a valuable security, knowing it to be forged, and with intent to use it as genuine, under Section 474. We think that in this case it will be safest to base the conviction on Section 474.

That the prisoner came to the Deputy Magistrate's Court with the intent to use the fresh and forged document, if necessary, may be safely inferred from the facts of the case and from the conduct of the prisoner. And it may also be fairly argued that he had the document in his possession, knowing it to be forged, and intending to use it at any time should it be necessary.

But there is no proof that he actually forged the document himself. **Vol. VIII.**

On the other hand, the guilt of this prisoner does not appear to be of a very heinous kind, comparatively.

There is nothing to show that he intended to defraud the widow of Zumur : on the contrary, there is evidence that she had received a sum which satisfied her claims under the *kabin*. The case in which the prisoner had been sued for breach of trust in not realizing the money due under the *kabin* had been compromised ; and, under all the circumstances, we think that the ends of justice will be met by reducing the sentence under Section 474 to two years' rigorous imprisonment in lieu of seven years' transportation under Section 466.

The 14th June 1867.

Present :

The Hon'ble W. S. Seton-Karr and A. G.
Macpherson, *Judges*.

Evidence—Character of prisoner.

Queen versus Phoolchand alias Pholeel Ahir and Sheosutrum.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of dacoity.

Evidence of a prisoner's previous convictions and bad character and of the bad character of his relations is inadmissible.

If a person is before the Court as a witness, his evidence must be recorded as the law directs ; if he is not a witness, and is not examined as such, the Judge has no right to allude to his having made any statement.

Macpherson, J. We have had great doubts as to whether the convictions in this case ought not to be quashed on account of the improper reception of evidence by the Sessions Court. Had the case been tried by a Jury, we should have considered it absolutely necessary to adopt that course, it being wholly impossible to estimate the extent to which the Jury might have been

Vol. VIII. influenced by the evidence in question. As, however, the case was tried by the Judge with Assessors, and as there is on the record what appears to be very ample proof of the prisoner's guilt independently of the objectionable evidence, we have come to the conclusion that we need not set aside the convictions. But we think that Mr. Elliot, the Judge, has passed so severe a sentence upon the prisoner Phooleel that it will be necessary to reduce the term of imprisonment awarded by one-half.

In his judgment the Judge says that the two prisoners (and others not arrested) "are all deposed to as residents of, and known to have bad characters of, witnesses' village. The prisoner Phooleel is a released prisoner; his brother and relations are *more or less jail-birds*: the younger prisoner, Sheosurrin, is of a family of similar description." These remarks are based on the following evidence: The witness Wuzer Ali says: "Phooleel is a *budmash*, and was released only last month or so from jail. His brother is in jail, Kashi; and his nephew is also now released from prison. Sheosurrin's father was in prison also for theft. The other four (not before the Court) were also in jail. They are all *budzats* and *jail-birds*."

The witness Khaja Khan says: "They are all *jail-birds*. Phooleel was about a year in jail, and his family-men have some of them been in jail. Sheosurrin has not been in jail that I know of, but his father was. The other four men (not before the Court) have each of them been in prison before. They are all thieves."

Nothing can be more irregular or more unfair to the prisoners than the admission of evidence such as this. The evidence as to the prisoner Phooleel's previous conviction and character even ought not to have been admitted (*see* VI. Weekly Reporter, page 72, Criminal Rulings). But the Judge must have known perfectly well that what had been done on other occasions by the fathers, or nephews, or brothers of the prisoners, was not, and could not, by any possibility, be evidence either for or against the accused, with reference to the special offence with the commission of which they stood charged. It was the plainest duty of the Judge, not only not to record any such evidence, but to take care that the witnesses were not allowed to make any statements whatever as to the character of any of the prisoners' relations. We may add that the Judge, in our opinion

(independently of the absolute illegality of the admission of such evidence), scarcely treats the matter with becoming seriousness in writing in his judgment in an off-hand manner that a prisoner's "*relations are more or less jail-birds*."

There is another irregularity in the mode in which the case was tried, which we cannot pass over without notice. The Judge names a witness Dhomun Julahir, and then makes a note that he has not recorded his evidence, adding: "I have examined him verbally, and he confirms the evidence above in every respect, and is therefore only a repetition."

This person Dhomun either was or was not before the Court as a witness. If he was, it was the duty of the Judge to record his evidence as the law provides; if he was not, the Judge had no right to allude to his having made any statement.

On the whole, we do not think that we ought to set aside the convictions, as there is ample evidence of a legal character to support them. But, under the circumstances, the case not appearing to us to be at all an aggravated one, the sentence on Phooleel is too severe, and we alter the sentence on him from six years' to three years' rigorous imprisonment. We reject the appeal of the other prisoner.

The 10th June 1867.

Present:

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges*.

Dismissal of Complaint—Police Enquiries (Chapter XIV., Code of Criminal Procedure).

Criminal Revisional Jurisdiction.

References under Section 434, Code of Criminal Procedure, and Circular Order No. 19, dated the 21st July 1863.

Queen *versus* Harrak Chand Nowlaka and others.

A Magistrate cannot dismiss a complaint without first examining the complainant.

An enquiry by the police into complaints falling under Chapter XIV. of the Code of Criminal Procedure is not warranted by law.

Jackson, J.—THE question referred by the Sessions Judge in this case is, whether the orders of the Magistrate in these cases are not illegal, in consequence of the Magistrate having dismissed the several complaints on the strength of reports made to him by

the police under Section 180 of the Code, the cases being cognizable under the XIVth Chapter of the Code.

We can have no hesitation in saying that it is against the law to throw out any complaint without first examining the complainant, although, after the complainant has been examined, it is quite competent to the Magistrate, if he sees no ground for proceeding, to dismiss the complaint (Section 67). If the case be not triable by the Magistrate, the Sessions Judge may, in such case, order an enquiry.

In the cases before us, the Magistrate states in the 2nd paragraph of his letter, dated 21st May, that he had first examined the complainants; but, on reference to the papers sent up, we are unable to find any trace of such examination, and we, therefore, conclude that the statement is inaccurate.

We have also to observe that an enquiry by the police into complaints falling under Chapter XIV. does not appear to be warranted by law, Section 180 not being one of the Sections of Chapter XII. which are made applicable to Chapter XIV. by Section 249.

The orders of the Magistrate are quashed, and he will proceed to enquire into these cases according to law.

The 13th June 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover.
Judges.

Confessions (involuntary)—Evidence (by Police Officers)—Judgments (Irrelevant remarks against prisoner).

Criminal Referred Jurisdiction.

Queen versus Dhurum Dutt Ojha and two others.

A police officer acts improperly and illegally in offering any inducement to an accused person to make any disclosure or confession. No part of his evidence as to the discovery of facts in consequence of such confession is legally admissible.

Remarks to the effect that the prisoner was a person of wealth and influence, and had prevented truth from appearing, ought not, unless established in evidence, to find a place in a judgment.

Glover, J.—THE prisoners in this case, Dhurum Dutt Ojha, No. 1, Lalloo Rai, No. 2, and Budree Hoormee, No. 3, have been convicted of murder, and sentenced capitally, subject to the confirmation of this Court.

Dhurum Dutt Ojha has been defended by **Vol. VIII.** Counsel.

The case for the prosecution is that the Brahmin prisoner, who is described as a man of position and influence, desirous of ridding himself of his kept woman, Mussamat Poosanee, who had brought a suit against him for maintenance, and had otherwise made public the nature of the liaison between them, sent his servant, the prisoner No. 3, to fetch her and her child (an infant of some two years) from Luchmeepore Pookheria, where she had lived in a pukka house belonging to Dhurum Dutt Ojha, to his own residence at Saogaon.

That, on her arrival there, she was made drunk, and afterwards conducted to a mangoe tope, half a mile or less distant, where the prisoner No. 2, likewise a servant of the Ojha, strangled her, the other two prisoners assisting. That the prisoner No. 2 afterwards strangled the child, and that the bodies of the two victims were carried off by Lalloo and Budree, and flung into a neighbouring "mun" or lake.

That they were afterwards removed by the same two prisoners, and carried to a small patch of jungle belonging to prisoner No. 1, where they were buried, and from which they were afterwards exhumed by the police.

It appears from the record that the murder took place on the 6th of March. On the 13th, Drigopal Chowkeedar reported the circumstance at the thannah, and the police commenced an enquiry, the result of which, we may state shortly, was that the prisoners Nos. 2 and 3 confessed that what were said to be the remains of the murdered persons were found, and eye-witnesses to the murder discovered.

The prisoners Nos. 2 and 3 confessed to the Magistrate that they had assisted at the murder of the woman and child by the order of prisoner No. 1, and the prisoner Lalloo repeated his confession at the Sessions. The evidence of the Magistrate, Mr. Beames, was taken as to the fact of the confessions having been properly made before him, and there is no reason to suppose that they were otherwise than voluntarily given.

With regard to the prisoner No. 1, Dhurum Dutt Ojha, the case is different; and we think that he cannot be convicted on the evidence as it stands on the record. It is a matter of great regret that the Sessions Judge did not order a conditional pardon

Vol. VIII. to be offered to the prisoner Laloo, and so have secured some reliable testimony against the chief offender, the more especially as he evidently distrusted the evidence of the two eye-witnesses. As it is, the result is a lamentable miscarriage of justice.

We will examine somewhat in detail the evidence on which this case has proceeded. Drigopal, a chowkeedar, deposes to having overheard (whilst going his rounds at night) the wife of the prisoner Budree saying to her husband, "Why did you murder?" Next day, this witness spoke to Budree on the subject, and succeeded in eliciting from him the whole story of the murder, on which he started off to the thannah and gave information.

A head constable made the first enquiries, which resulted in the arrest of all three prisoners; but he was speedily superseded by the Court Inspector who had been specially deputed to investigate the case; and here we must remark with strong disapprobation on the way in which the Court Inspector conducted the investigation. Section 146 of the Code of Criminal Procedure expressly forbids a police officer from offering any inducement to an accused person to make any disclosure or confession: but in the face of this prohibition, a prohibition of course well-known to him, he told the prisoners Laloo and Budree that, if they would confess, he would manage their release: to use his own words: "The prisoners Nos. 2 and 3 were told by me that I would get them released if they would speak the truth: this is the dustoor."

The Sessions Judge remarks on this: "It is extremely doubtful how far witness No. 2 (the Court Inspector) was justified in thus speaking to prisoner No. 3 who was then doubtless under grave suspicion of murder." We have no doubt whatever that the police-officer's conduct was highly improper and illegal, and that no part of his evidence as to the discovery of facts in consequence of the confessions is legally admissible.

The testimony of the two eye-witnesses, Gholam Hossein and Jhapsee Dhanook, is however on record, and we now proceed to notice it. It is the only direct evidence against the prisoner No. 1; but, if credible, it is amply sufficient to convict him of the murder.

Golam Hossein states that, about three days before the "Sooruj Poojah," he went to the prisoner No. 1's pukha house at Saogaon.

He does not say in his evidence at the Sessions what he went there for, and as Dhurm Dutt Ojha had some time before turned him out of house and home, and reduced him from a cultivator to a coolie, it is *prima facie* unlikely that he would have paid a visit to one who had treated him so badly. At all events, an explanation of his presence should have been obtained. Whilst waiting, as he says, at the door of the room in which Dhurum Dutt Ojha was doing poojah, the prisoner Budree came and reported that he had brought the woman Pooanee and her child, and had placed them in the garden (phoolwaree). This witness was apparently allowed to remain where he was in front of the house and within a few paces of the phoolwaree, unnoticed and unquestioned, and from where he was he says that he saw the prisoners eating and drinking two bottles of *sharab* which had been furnished by Dhurum Dutt Ojha. It was at 3 ghurries of the night that this took place, and the night is admitted to have been a dark one. Now, there are startling improbabilities in this story. In the first place, is it likely that the witness would have been allowed to remain in full view, in front of the house, and never have been discovered or questioned? Again, is it likely that he, standing as he says within 10 paces of the drinking party, would have remained unnoticed by persons who, according to his after-statement, were then meditating a dreadful crime? Lastly, is it likely, or rather is it not so unlikely as to be almost beyond the bounds of reasonable belief, that a high caste Brahmin, such as Dhurum Dutt is said to have been, should eat food and drink wine with two low-caste Hindoos? It appears to us only necessary to read this man's evidence to be convinced of its falseness.

To return however. This witness deposes further that, after eating and drinking, the woman (who was somewhat intoxicated) and the prisoner Budree went away towards the west, Dhurum Dutt and Laloo coming back to the house. The witness remained where he was, still unquestioned—why, is not stated nor explained—and after waiting some time (both ghurry and ghunta are the words used, and it might be an hour or only 20 minutes) he saw the prisoners Nos. 1 and 2 come out of the house and go south. Witness followed them as he says from curiosity to a place called the Maharaja's Bagheecha, half a mile distant, and he there saw the three prisoners with the woman and the child sitting under a tree.

The witness then describes how that the prisoner Budree threw a cloth over the woman's head, and pulled her backwards, when Lalloo fell upon and strangled her, Dhurum Dutt holding her legs, and how the child, beginning to cry, was afterwards strangled by Lalloo.

He goes on to say that, horrified at the sight, he remonstrated and called out, "What zulum are you doing?" On which Dhurum Dutt Ojha, who, if this witness's statement be true, must have been utterly ignorant of his vicinity, replied, "You are my ryot: hold your tongue."

The bodies were then tied to a bamboo, and the prisoner No. 1 ordered the other two to throw them into the lake: the woman's *saree* was taken from her corpse by the prisoner Dhurum Dutt, torn in half, and given to the two others. This is a point in the case which might, if true, have been corroborated. A *dholac* of the village is said to have taken one of the halves of the *saree* to wash. But the man was not produced, nor was any attempt made to record his evidence.

The witness then went back to the prisoner No. 1's old house, which is half a mile distant from the new one.

But, before going, he found to his surprise that he had not been alone in his place of espial. Another man, Jhapsee Dhanook, witness No. 4, had followed the prisoner likewise out of curiosity, and had witnessed the murder.

This witness deposes to much the same effect as Gholam Hossein, and there is this difference in favor of his position that he was, or says he was, a servant of Dhurum Dutt, and had therefore a reason for being on the premises at the time the woman is alleged to have been brought there.

After a careful review of this evidence, we have no hesitation in expressing our entire disbelief in any part of it. The improbabilities are glaring, and some portion, *i. e.*, those that refer to what took place at the time of the murder, are, we may almost say, physically impossible. The night was dark, the place a thick mangoe tope: under such circumstances, a man could distinguish nothing of what was going on within even a few yards of him, much less detail with such suspicious minuteness everything that is said to have happened from beginning to end.

Whilst on this part of the case, we may remark that the prisoner No. 2, Lalloo, in his confession before the Sessions Court, denies that these witnesses were present at the time of the murder, and alleges that they were taught what to say by the police authorities and in his presence.

We can conceive no reason for this man's speaking falsely on this one point: he had certainly nothing to gain by doing so; and the excessive improbability of the evidence of Gholam Hossein and Jhapsee Dhanook lends a color to his statement.

And lastly, it is scarcely to be believed that Gholam Hossein, a man who, according to his own account, had been deeply injured by the prisoner Dhurum Dutt Ojha, after witnessing what had put his enemy so completely in his power, should keep silence altogether, and neglect to inform the police, although there was a *thanah* within two miles of the scene of the murder.

The next witnesses for the prosecution are two, Jolahas Pilla No. 5, and Rohman No. 6.

They state that one day (date not mentioned), as they were passing by the lake, they saw "a body, with a child tied to it, floating;" they were not able to say whether the body was that of a male or female, although they passed close to it.

They depose, further, that, on the same day, or rather in the night of that day, about 10 o'clock, they met the prisoners Nos. 2 and 3 carrying a body slung on a *latie* from the direction of the lake. They say that they knew the men and accosted them, and that the prisoners replied "choop, choop," and went on their way eastward.

It is remarkable that these witnesses never mentioned a word of what they had seen until the Court Inspector got hold of them. It is suggested, indeed, that the prisoner No. 1 was a person of great wealth and influence, and prevented the truth from appearing; but there is no evidence of this on the record, and such remarks ought not, unless established in evidence, to have found a place in the judgment.

The last witness, Lal Sahai, proves that a Brahmince woman, the mistress of the prisoner No. 1, used to live in his village of Luchmeepore Pookheria, and that the prisoner Budree took her away from there two days before the "Sooruj Poojah."

This was the case for the Crown.

The bones found in the jungle at the place pointed out by Budree were sent to

Vol. VIII. the Medical Officer, with the request that he would report on the cause of death—a thing he was, as a matter of course, unable to do. He was not asked to state what the bones were—whether those of adults, or of children, or of the male or female sex. This omission on the part of the Magistrate has destroyed one link of the evidence; and, as the Medical Officer had died before the trial came on, the omission could not be repaired.

As the case stands, therefore, the only evidence against the prisoner Dhurum Dutt Ojha is that of the witnesses Gholam Hossein and Jhapsee; and, for the reasons above given, we think it altogether untrustworthy.

Without it, the fact of two bodies, not proved to have been those of the murdered women, being seen in the lake, does not affect this prisoner; nor does the subsequent discovery of certain bones, which may or may not have been the bones of the deceased and her child in the place pointed out by Budree.

Neither does the fact of the woman's being taken away from Luchneepore Pookheria necessarily connect the prisoner with her disappearance; it is evidence against the prisoner No. 3, but a matter of suspicion only against Dhurum Dutt Ojha.

It is greatly to be regretted, as we before observed, that the Sessions Judge did not exercise the power given him, and direct a conditional pardon to be offered to the confessing prisoner.

As it is, we are forced to declare that there is no credible evidence on the record against the man who, we have no doubt, is the principal offender, and to direct his release.

The other two prisoners confessed, the one to the Magistrate, the other to both Magistrate and Sessions Judge. There is no reason to suppose that these confessions were not voluntarily given; and, taken with the circumstantial evidence, they are sufficient for conviction.

We think, however, that it would not be expedient, under the circumstances of this case, to confirm the sentence of death passed upon these prisoners. We therefore commute it to one of transportation for life.

The 15th June 1867.

Present:

The Hon'ble W. S. Seton-Karr and
A. G. Macpherson, *Judges.*

Abetment—Section 94, Act XX. of 1866.

Queen versus Gopal Prosaud Sein and others. Committed by the Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of making a false statement, under Section 91, Act XX. of 1866, &c.

Under Section 94, Act XX. of 1866, an abettor may be punished more severely than his principal can be.

Macpherson, J.—We dismiss these appeals, as the convictions and sentences appear to us to be fully supported by the evidence. Nilkunt Nund might have been, and perhaps it would have been better if he had been, charged under Section 474 of the Penal Code. And in his sentence there is this peculiarity and apparent anomaly, that he has received a heavier sentence as an abettor than could have been passed upon him if convicted for the principal offence. But the sentence which has been passed upon him is strictly in accordance with the provisions of Act XX. of 1866, Section 94, from which it appears that the Legislature intended that the Courts should have power in certain cases (as for instance when he is the chief offender, the person really pulling the strings, and for whose benefit the offence is, in fact, committed) to punish the abettor more severely than the person who actually commits the substantive offence. Moreover, the prisoner Nilkunt has in no way suffered from the form which his conviction has taken, for, if convicted under Section 474, he might have received a far more severe sentence.

The 17th June 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Evidence.

Queen versus Mussamut Joomnee and another.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of administering stupefying drug with intent to commit theft.

Recognition of things not before the eyes of deposing witnesses is not evidence against a person accused of having been in possession of those things.

Glover, J.—With regard to the appellant Mussamut Joomnee, we think that the facts of the case were properly laid before the Jury, and that their verdict of guilty must stand, there being no point of law involved.

But we also think that there has been a misdirection in the case of the other appellant Joomun. He has been convicted of dishonestly retaining in his possession stolen property, the only evidence against him being that a *thalee* said to have been stolen from the prosecutor was found under his arm, he being the brother in law of the female prisoner.

Now, this *thalee* was not produced at the trial, and recognition of things not before the eyes of deposing witnesses is not evidence against a prisoner accused of having been in possession of those things.

Moreover, there was no attempt to prove that the prisoner Joomun had a guilty knowledge that the *thalee* had been stolen. He was admittedly altogether unconnected with the theft, and lived a considerable distance off; and, supposing for argument's sake that the *thalee* (an article common in all houses) brought to his house by his sister-in-law was the identical *thalee* stolen from the Pasee, there would arise no presumption that Joomun knew it to be so, or had any reason to suppose that it was so.

We consider that these points in favor of the prisoner ought to have been brought prominently to the notice of the Jury, and that the neglect of the Judge to do so was a substantial misdirection prejudicing the accused's case.

And, as there was no other evidence whatever against the prisoner, we direct his discharge.

The 17th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges*.

Irregularity—Conviction and sentence (in the absence of the prisoner).

Criminal Revisional Jurisdiction.

Revision under Section 404, Code of Criminal Procedure.

Queen versus Rajcoomar Sing.

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A conviction and sentence arrived at by a Deputy Magistrate in the absence of the prisoner were quashed as irregular.

Jackson, J. These proceedings are altogether irregular, and must be set aside.

The conviction and sentence arrived at by the Deputy Magistrate in the absence of the prisoner are quashed, and the proper Magistrate will call the prisoner before him, and, after recording conviction (unless he see reason why the prisoner should not be convicted), he will pass sentence *de novo*, such sentence not exceeding the sentence irregularly passed, and the period of imprisonment which the prisoner has already undergone under such sentence being deducted.

It is not clear what the Magistrate means by the remark that the Joint Magistrate's proceedings, in ordering the prisoner into confinement, were of an executive character, subject to appeal to the Magistrate.

The 17th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges*.

Jurisdiction (of Deputy Magistrate to question legality of attachment by Civil Court)—Municipal Tax (Payment of—out of Fine).

Criminal Revisional Jurisdiction.

Reference under Section 434, Code of Criminal Procedure.

Queen versus Brojo Kishore Dutt.

The legality or formality of the mode of attachment, allowed by a Civil Court, is not a matter for a Deputy Magistrate's consideration.

Where a Deputy Magistrate, considering that the attachment of a carriage in execution of a decree of a Civil Court was illegal, because it was placed in the custody of the judgment-debtor's husband, and that the husband had acted fraudulently in recovering and concealing the wheels and axles of the carriage on its subsequent distraint for arrears of Municipal tax, convicted him of an offence under Section 424 of the Penal Code, the conviction was set aside.

A Deputy Magistrate has no authority to order arrears of Municipal tax due by a person to be paid out of a fine levied on him.

Jackson, J.—We are of opinion that the petitioner has been improperly convicted
Cr. 70.

Vol. VIII. under the 424th Section of the Indian Penal Code.

It appears from the Deputy Magistrate's judgment that a decree was given against one Panoolla at the suit of Sowdaminee, the wife of the accused; that, execution of this decree being sued out, the carriage and other moveable property of Panoolla were attached and placed in custody of the accused.

Subsequently, an officer of the Municipal Commissioners distrained the goods of Panoolla for arrears of Municipal tax, and seized the carriage in question, after which the accused removed the wheels and axles, and concealed them.

The Deputy Magistrate considered that the attachment of the carriage by placing it in the custody of the accused, who was husband of the judgment-debtor, was illegal and *ab initio* null and void, and that the circumstances of the removal were such as indicated fraud.

We think the legality or formality of the mode of attachment allowed by the Civil Court in this case was not a matter for the Deputy Magistrate's consideration, and that he should confine himself to his own province.

The accused may have acted inconsiderately and improperly in doing any act in infraction of the distraint levied by the Municipal Commissioners, and it was probably with a view to his being dealt with under the provisions of the Indian Penal Code relating to contempt of the authority of public servants or the like that the Chairman authorized the prosecution in the case.

But we think it quite clear that the conviction under Section 424 cannot stand. We set it aside, and order the fine, if it has been levied, to be refunded.

We observe that the Deputy Magistrate ordered the arrears of Municipal tax due

from Panoolla to be paid out of the fine, an order for which we are not aware of an authority.

The 17th June 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover
Judges.

Finding of Judge—Evidence to prove alibi.

Criminal Revisional Jurisdiction.

Revision under Section 404, Criminal Procedure Code.

Queen *versus* Madho Surrun Singh.

The prisoner was declared entitled to a finding by the Sessions Judge as to the sufficiency or otherwise of the evidence adduced by him to prove his *alibi*, and that he did not abscond to evade justice.

Kemp, J. THE prisoner has been heard through his pleader.

When this case was before us on a reference by the Sessions Judge under Section 434, we held that the Sessions Judge was wrong in holding that the proceedings of the Assistant Magistrate were illegal, inasmuch as the case had not been struck off the file, because the accused had cleared himself of the crime charged, but simply because there then appeared to be little prospect of bringing the guilty parties to trial.

The prisoner is entitled to a finding by the Sessions Judge of the sufficiency or otherwise of the evidence adduced by him to prove his *alibi*, and that he did not abscond to evade justice.

Remanded for that purpose.

The 22nd June 1867.

Present:

The Hon'ble W. S. Seton-Karr, *Judge.*

Fabricating false evidence—Punishment.

Queen *versus* Kalachand Boidyo, &c.

Committed by the Magistrate, and tried by the Sessions Judge of the 24-Pergunnahs, on a charge of fabricating false evidence, &c.

A sentence of three years' imprisonment is not too severe a punishment for a deliberate attempt to pervert justice by fabricating in one office false statements to be designedly and corruptly used in another.

In this case the prisoners have been convicted—Kalachand of causing false evidence

to be fabricated, and of having attempted to use the same as genuine; and Motee Lall, of having fabricated false evidence by antedating an order on a petition.

The facts disclosed by the evidence show that the prisoner Kalachand, when accused before the Deputy Magistrate by one Nil-monee Nundee of extortion practised on the 26th of July, wanted to prove that, on the day in question, he was at the Office of the District Superintendent of Police at Alipore, and that Motee Lall, the second prisoner, presented a petition shewing that Kalachand was at Alipore at the catcherry on the day in question, and got an order endorsed on the back of the petition, and signed by the District Superintendent, Mr. Larrymore.

It now turns out that at the very time the District Superintendent, Mr. Larrymore, was very many miles away from Alipore, engaged on a local enquiry, and that he could not possibly have signed the order on the day in question, nor for some days afterwards.

That the order was antedated and put in to serve the purpose of proving a false *alibi* there can be no doubt; and the inference that Kalachand wanted to make use of this petition in his defence, knowing it to be false, is irresistible.

The second prisoner at first admitted that he wrote the order; but it turns out that he was not really appointed to the office he held until five days after the order.

The Jury were fully and properly charged, and the points in favor of the prisoners, such as they were, laid before the Jury.

The petitioners put in long statements, in appeal, impugning the charge and conviction on the ground of general illegality; but they do not specify what is illegal, or how they are affected thereby, except in a general way.

Act XIX. of 1850, which they quote, has not the remotest bearing on their case; and Section 24 of Act II. of 1855, to which Section I consider they allude, merely says that vakeels are not to disclose the professional secrets of their clients. The witness Nubo Narayan, to whom allusion is thus made, has not made any disclosures. He has merely spoken as to what took place on the original trial of Kalachand, and as to the presentation of the petition at Alipore, on which trial he defended the prisoner. These facts might have been proved without this witness, and, in fact, they are not denied by the prisoner.

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Altogether, I am quite satisfied that the prisoners have had a full and fair trial, and that they have been justly convicted.

At the close of their petition, the prisoners complain of the severity of their sentence.

A sentence of three years' imprisonment is by no means too much for a deliberate attempt to pervert justice in this way by fabricating false statements in one office which were to be designedly and corruptly used in another.

The appeals are rejected.

The 24th June 1867.

Present:

The Hon'ble F. B. Kemp, A. G. Macpherson, and F. A. Glover, *Judges*.

Misdirection—Evidence of Accomplice—Corroboration.

Queen versus Nawab Jan and others.

Committed by the Magistrate, and tried by the Sessions Judge of East Burdwan, on a charge of dacoity, &c.

Conviction and sentence set aside (Glover, J., dissenting) as to two of the prisoners, on the ground that there was a misdirection to the Jury, because the Judge in summing up omitted to advise the Jury not to convict upon the uncorroborated evidence of an approver, and because he treated as corroborative that which was no corroboration in law.

Glover, J. ALL the prisoners in this case have appealed, and the appeals of Nawab Jan, prisoner No. 39, Kooderam Mitter, prisoner No. 40, and of Norool Hoodda, prisoner No. 46, have been argued by Counsel.

With regard to the prisoners Nos. 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 26 to 35, and prisoners Nos. 41 to 45, there was independent evidence as to their presence at the dacoity, evidence which appears to have been very fully and fairly laid before the Jury by the Sessions Judge, and no point of law is taken in their petition of appeal. The Jury believed the evidence, and the conviction should stand.

The other three prisoners have been convicted of abetment. And, first, as to the prisoner No. 39, Nawab Jan.

It is contended on his behalf that the Judge misdirected the Jury, and prejudiced the prisoner's case in the following particulars:—

(1.) That he left the evidence of the approver witness Rahmut Sheik to the

Vol. VIII. Jury, without duly cautioning them as to the nature of that evidence.

(2.) That corroboration of this witness's evidence was necessary, and that what was laid before the Jury as corroborative evidence was in reality not so.

(3.) That the prisoner ought to have had the benefit of the break down of the prosecution in no less than 14 out of the 15 counts charged.

(4.) That the Judge omitted to mention to the Jury the failure of the prosecution in the matter of Nawab Jan's alleged attempt to escape, and of the intercepted letter -- omissions which prejudiced the minds of the Jury against him.

(5.) That the Judge ought to have left the question, as to whether the lattials came from the Nawab's cutcherry, and were his servants, for the Jury to decide, and not have directed them that the lattials *did* come from the cutcherry, and *were* the prisoner's servants.

And, generally, that the Jury ought not to have had their attention directed to particular counts of the charge only, but should have been told to consider all the charges together, and to give the prisoners the benefit of any doubt regarding any particular charge, which might arise from the fact that all the rest of the charges had failed.

In support of the appeal, the judgment of the Full Bench of this Court, in the case of Elahce Buksh (V. Weekly Reporter Sec), has been relied on; and, with reference to it, I am willing to admit at once that the Judge's charge in this trial is not a satisfactory one; but the question is whether it amounts to a misdirection.

Alluding to the evidence of the approver, the only direct evidence against the prisoner, the Judge said this: "With regard to the credence to be given to the evidence of the said Rahmut Sheik, the Jury, when weighing the same, will remember that it is the evidence of a party charged with an offence, deposing under a conditional promise of pardon. This is no reason for altogether distrusting the evidence given, but it is necessary to receive such evidence with caution, especially when it makes mention of words spoken by the prisoners, such statements being incapable of any corroboration or of contrary proof being adduced to rebut them."

The Judge said further that, although there were various improbabilities in Sheik Rahmut's evidence, still he was of opinion

that it should not be rejected as altogether untrustworthy, and he mentioned to the Jury certain circumstances which he considered as corroborative of Rahmut's testimony. This Rahmut was, no doubt, a very unsatisfactory witness; his story was in many points in the highest degree improbable, and he was admitted to have made false statements in at least one particular; still it did not necessarily follow that all that he said was false, and the Judge was not wrong in telling the Jury that it did not.

As to the corroboration, so much of it as referred to Nawab Jan's presence at Kulna, and to his behaviour there, was, I have no doubt, improperly put before the Jury; for corroboration of Rahmut's statement as to the Nawab's going to Kulna would be no evidence to connect the prisoner with the offence of which he has been convicted. Corroboration must be on a point material to the issue, and the evidence of fifty respectable witnesses in corroboration of Rahmut's account of Nawab Jan's presence at Kulna would not make Rahmut's evidence on other and entirely different points a whit stronger than it was before. Then as to the cries or shouts said to have been raised by the lattials at the time of the attack. It is urged that the Judge was wrong in telling the Jury that they (the cries) were corroborative evidence. What the Judge says is:

"If the Jury believe that this cry (*i. e.*, this is the day of Nawab Jan, Koodeeram Mitter, and Norool Hoodda) was raised, although the mention of these names of the prisoners by the lattials cannot be taken as direct evidence against them, it is clear that the mention of their names by parties who are known to have been their servants may be taken as a corroboration of the other circumstantial evidence." What I understand the Judge to mean is, that Rahmut's statement as to Nawab Jan's action in the matter being in evidence, if the Jury *prima facie* believed his connection with the attack, they might take as corroborative evidence the cries of the lattials, who came from his cutcherry, and were his servants; and, if this were his meaning, I cannot say that the Jury were improperly directed. If he had told the Jury to consider these cries as corroborative evidence *per se*, and without reference to the evidence connecting Nawab Jan with the conspiracy, then I have no doubt he would have been wrong.

Again, as to the corroboration derivable from the prisoner Nawab Jan's motives for

abetting the attack on Jurreefunnissa's premises, it is urged that the Judge should have told the Jury that there was no evidence of any motive. On this point it seems to me that the Judge went quite far enough. He said: "The causes are said to be enmity existing on account of quarrels arising out of the institution of a new market by the prisoner No. 39 (Nawab Jan) through his servant Kooderam, and a claim which had been set up to the property held by Jurreefunnissa by the prisoner Norool Hooda."

The Judge then proceeded to comment on the different ways in which different people were actuated, and ended: "The Jury must consider whether there is proof that some degree of enmity did exist between Nawab Jan and the parties who have been attacked in this case, and also whether they are satisfied with the proof that there was an intimate relation existing between the prisoner Nawab Jan and Norool Hooda." He then mentioned the evidence which appeared to connect the two men together, and left it to the Jury to believe that evidence or not.

With regard to the circumstantial corroboration of the approver's evidence as to Nawab Jan's motive in going to Kulna two days before the dacoity, the Judge said: "The cause assigned for the visit of Nawab Jan to Kulna is insufficient," and he gave his reasons for so thinking, leaving it to the Jury to say whether the prisoner had accounted for his going to Kulna or not. The question does not appear to have been very material one way or the other, but the Jury were entitled to consider it: it was a circumstance of suspicion which might have been taken in connection with the other evidence in the case. Taking the Judge's charge on the point of corroboration, therefore, as a whole, I should not say that it was wrong in law, though it might easily have been more explicit and careful, considering the extremely weak nature of the evidence throughout. But, were it otherwise, if the Judge's caution to the Jury had been sufficiently strong, the objection would fail, for, if after due and sufficient warning a Jury choose to believe the uncorroborated evidence of an accomplice even in the face of violent improbabilities, their finding would, I apprehend, be legally unassailable.

Then, as to the 3rd objection taken by the prisoner's Counsel, it appears to me that, as the Judge charged for an acquittal on the

14 counts, the prisoner had all the benefit that he was entitled to, and that there would have been no ground for distrusting the evidence in support of the "abetment," merely because there was none to prove active participation in the dacoity itself, or of knowingly retaining portions of the plundered property afterwards. Moreover, the Jury had all the evidence before them, and could judge for themselves. It was not, I conceive, the Judge's duty to do more than point out the weakness of the evidence on these counts.

The 4th objection relates to the Sessions Judge's omissions.

No doubt, it would be a good ground of appeal if, in summing up evidence, a Judge were to lay before a Jury only that which bore against the prisoner, and not that also which was in his favor.

Now, the Judge has admittedly made no mention either of the alleged attempt to escape, or of the letter said to have been found in the jail well; but nothing was made of these points at the trial. It was never seriously alleged that Nawab Jan attempted to evade arrest (the word escape has been used improperly Nawab Jan never tried to escape after being arrested), and the question seems never to have been entertained; it was certainly not in the least relied upon for the Crown, and it cannot be supposed that the omission of the circumstance from the Judge's charge had any prejudicial effect on the minds of the Jury.

The same remarks apply to the letter. The evidence on both points appears to me to have been virtually struck out of the record, and was not put to the Jury, either one way or the other. It would have been better had the Judge noticed the circumstance; but I cannot think that his not having done so prejudiced the prisoner, or amounted to a misdirection.

On the 5th objection I think that the Judge did, as a matter of fact, leave both questions to the Jury. There was evidence on both points: in the first a considerable mass of evidence; and although the Judge used the words "known to have been their servants," he referred, as it seems to me, to the evidence which he had already pointed out to the Jury, and left the whole matter in their hands.

His words were: "It is first necessary to see where the latials are said to have come from, and where they are said to have

Vol. VIII. "returned after the attack. The universal story is that they came from the Srikistopore cutcherry, and returned to it again; and, though there appears to be some doubt as to whether the said cutcherry is actually visible from the houses which were plundered, there can be no doubt but that the fact that the attack came from the cutcherry is substantially correct: and that this was the case, is attested directly by the witness Tofa Sheik, one of the witnesses for the Crown, who swears that he was engaged in the attack, and went from the Srikistopore cutcherry. The Jury will consider whether this evidence, corroborating that of the other witnesses for the prosecution, is to be believed, and whether they are satisfied that the attack did emanate from the said cutcherry: that cutcherry is the sudder cutcherry of the Kalypore Pergunnah, as has been proved by the evidence of many witnesses, and it is not denied that the prisoner Nawab Jan is the zemindar of that pergunnah, although it is said that it had been farmed out to several different parties in the month of August last, and several of the witnesses swear that the prisoner No. 39 remained at that cutcherry in the capacity of naib, and this is admitted by the prisoner in his examination before the Court."

On the whole, therefore, and whilst admitting that the Judge's charge is not as full and complete as it ought to have been, that it is in fact an unsatisfactory charge, I do not think that such a substantial misdirection has been made out as would justify this Court in interfering with the verdict found against Nawab Jan.

The case against Koodeeram is somewhat stronger than that against his master Nawab Jan, inasmuch as two approver witnesses deposed to his giving orders for the dacoity, and there was circumstantial evidence besides, which, if believed, went some way to support the charge. The remarks above made regarding the approver's evidence apply equally to this prisoner: and although, as I said before, I could have desired to see the Jury more carefully and strictly warned against what I should have considered, had I been trying the case, very suspicious evidence, still I cannot say that they were *not* warned, or that the Judge's charge was a misdirection.

There remains the case of Norool Hoodda.

And this prisoner is in a very different position from that of the other two appellants.

With the exception of the fact that he accompanied Nawab Jan to Kulna, there was no evidence whatever against him. He was not mentioned by the approver witness as having been present when Nawab Jan ordered the attack; nor is there anything to connect him with it. The alleged facts that he was assisted by Nawab Jan in trying to defeat Jurreefunnissa's claims—that he was at feud with that lady, and was to have been put in possession of her property—even if proved, were no evidence against him; nor (the not being proved to have been connected with the conspiracy) were the cries of the latials at the time of the dacoity. His filing a petition against Jurreefunnissa just before the dacoity, and his sending Prannath to do the same after the dacoity, may have been suspicious circumstances, but they raise no fair presumption that he abetted the commission of the dacoity, and the evidence of alleged enmity was altogether inadmissible, and should have been rejected.

It appears to me therefore that, as regards this prisoner, the Judge should have directed the Jury to find a verdict of "not guilty," on the ground that there was no evidence against him, and that the Judge's charge in this respect was a substantial misdirection prejudicial to the prisoner.

I would order the discharge of this prisoner.

A question was raised by the appellant's Counsel as to the amount of punishment. They contended that, even if guilty, the prisoners Nawab Jan and Koodeeram had been visited with the heaviest punishment allowed by law, and that such excessive severity was uncalled for.

The sentences ten years' transportation with heavy fines are undoubtedly severe, but I cannot say that they are excessive for the offences found to have been proved. Two separate dacoities, with reiterated assaults on the police, disclose a state of lawless violence which most properly subjects the abettors of such outrages to very severe punishment, and this Court would not, in my opinion, be justified in practically nullifying the verdict of the Jury, because it had doubts as to the correctness of that verdict.

I would dismiss the appeals of Nawab Jan and Koodeeram.

Kemp, J.—I quite concur with my learned brother in rejecting the appeals of the prisoners Nos. 10 to 35, and Nos. 41 to 45.

I am also of opinion that there was no evidence whatever to go to a Jury in the case of the prisoner Norool Hoodla, and that he must be discharged.

With reference to the prisoners No. 39, Nawab Jan, and No. 40, Koodeeram Mitter, who have been convicted of the offence of abetment of dacoity, I am of opinion that the Judge's charge to the Jury contains misdirections in points of law; that he has omitted to guide the Jury as to the nature and weight of the evidence; in short, that there are defects and omissions whereby the prisoners have been materially prejudiced. Such being the case, I would set aside the verdict of the Jury and the convictions founded upon it, and order the prisoners to be discharged.

My learned brother, whilst admitting that "the charge of the Judge is not as full and complete as it ought to have been, that it is "in fact an unsatisfactory charge," is nevertheless of opinion "that no such substantial misdirection has been made out as would justify the Court in interfering with the verdict found against the prisoners Nawab Jan and Koodeeram Mitter." I regret that, after much consideration, I cannot concur in this opinion.

I take the case of the prisoner Nawab Jan first. This prisoner was arraigned on no less than 15 counts, including one charging him with the guilty receipt of a portion of the stolen property, a charge which hopelessly broke down. He was acquitted on 14 out of the 15, and was convicted of abetment, and sentenced to 10 years in transportation, and to pay a fine of rupees 10,000, which is to be levied from his estate, and paid as compensation to Jureefunnissa and Muksood Ali in equal proportions.

Against the prisoner Nawab Jan, the case being stripped of all extraneous and suspicious features, such as his presence at Kulha at the time of the dacoity without any apparent good reason, there is absolutely nothing that can be called evidence beyond the statement of the approver-witness Ruhmut Sheik. This witness, the mental servant of the prisoner, states that two days before the plunder took place, he took a letter from the prisoner Nawab Jan to the Srikistopore cutcherry, a cutcherry admittedly situated in the prisoner's zemindary—that Nawab Jan sealed the letter, the contents of which were unknown to the witness. He also refers to a conversation said to have taken place between Nawab Jan and another prisoner,

Prannath, who has been convicted, in the Vol. VII course of which the latter said to the former, "The houses have been plundered, and are burnt." Nawab Jan said, "Very well." On cross-examination this witness said that Nawab Jan gave the order to the prisoner Koodeeram about 12 days before the plunder; that there was no one present at the time.

In submitting this evidence, which comes from a tainted source to the Jury, the Judge wholly omitted to tell them that this witness had been hunted up after the case had been committed to the Sessions, and while his master, the prisoner Nawab Jan, was in hajut awaiting his trial.

The Judge, in my opinion, did not, with sufficient emphasis, caution the Jury as to the danger of paying any respect to the testimony of the approver Ruhmut Sheik, and he wholly omitted to guide them as to what amounted to legal corroboration, *viz.*, that the testimony of the approver ought to be corroborated in some material circumstance, such circumstance *connecting and identifying* the prisoner with the offence. In the case of Fataee Bukshi, reported in Volume 5 of the Weekly Reporter, Criminal Rulings, page 83, a quotation from the charge of Baron Alderson in the case of *Rex versus Wilkes and Edwards* is given. That learned Judge said: "There is a great difference between confirmation to the circumstance of the felony and those which apply to the individuals charged. The former only prove that the accomplice was present at the offence; the latter show that the prisoner was *connected* with it. The distinction ought always to be attended to."

The Sessions Judge omitted to draw the attention of the Jury to this distinction, and the circumstances of corroboration which he submitted to them as sufficient in law were clearly not so. For instance, he says: "With regard to the prisoners Nawab Jan and Koodeeram Mitter, there is the fact sworn to by many witnesses that their names were called out by the lattials when they attacked the house." "If," says the Judge, "the Jury believe that this cry was raised, although the mention of the names of the prisoners by the lattials cannot be taken as direct evidence against them, it is clear that the mention of their names by parties who are *known* to be their servants may be taken as a corroboration of the other circumstantial evidence which has been adduced against the said prisoners."

Vol. VIII. I am of opinion that this was clearly a misdirection. It is admitted that the prisoners were not present at the time of the dacoity. To make the cries of the dacoits corroborative evidence against the prisoners, it must first be proved that the dacoits were set in motion by the prisoners, and that the offence was the probable result of the abetment or a part of the conspiracy.

The Judge was wrong in telling the Jury that the cries were uttered by persons known to be the servants of the prisoners. He ought to have told them that, unless the evidence established

Note.—The prisoners were acquitted of the charge of hiring the lattials.

the fact that the prisoners did abet the offence, and that the dacoits were the hired

servants of the prisoners, the cries of the mob ought not to be received as evidence as forming part of the *res gestæ*, and showing the character of the principal fact.

Again, the Judge tells the Jury "that the witness Rahmut Sheik swears that the prisoner Prannath came to Nawab Jan at Kulna before he had laid his complaint before the Deputy Magistrate, and he swears that Norool Hoodda accompanied Nawab Jan to Kulna, and stayed with him there. *"Any of these points,"* says the Judge, "if believed by the Jury, will serve to connect the prisoner Nawab Jan in some measure with the commission of the offence."

How the fact of Prannath coming to Nawab Jan at Kulna, or the circumstance that Norool Hoodda accompanied Nawab Jan, and stayed with him at Kulna, served to connect the prisoner Nawab Jan with the substantive offence, the abetment of which he is charged, I am at a loss to understand.

It is difficult to estimate to what extent these remarks may have influenced the mind of the Jury. That they were wrong, and calculated to prejudice the prisoner, appears to me to admit of no doubt.

Then, as to the motive for so gross an outrage, an all important feature in the case—for an attack repeated in the presence of and in direct opposition of the police, in which a very large sum of money (Rupees 15,000) and property of great value was robbed, could not but have been with a motive—the Judge tells the Jury that "the causes are said to be" (not proved to be) "enmity on account of quarrels arising out of the institution of a new market by the

prisoner Nawab Jan through his servant Koodeeram, and a claim which has been set up to the property held by Jurreefunnissa by the prisoner Norool Hoodda."

The Judge then tells the Jury that the prisoner Norool Hoodda had been already imprisoned on account of a somewhat similar attack during the lifetime of Gholam Rohman, the husband of Jurreefunnissa. He concludes his charge on this head, *viz.*, motive, with these remarks, "The Jury must consider whether they are satisfied with the proof that there is an intimate relation existing between the prisoner Nawab Jan and Norool Hoodda, who, as a claimant for the property, *may be considered* to have some motive to lead him to instigate the offence."

These remarks are, in my opinion, altogether improper, and ought not to have been submitted to a Native Jury, who are only too apt to adopt any suggestion, however speculative, as to motives for any given crime.

"Trial by Jury in the Mofussil is," as observed by the learned Chief Justice in the case of Elahee Buksh quoted above, "in its infancy: the persons of whom Juries are generally composed are necessarily more dependent upon the Judge than they are in England for sound and proper advice and assistance." In the present case we find the Judge suggesting to the Jury the following speculative motives for the crime, *viz.*, the erection of a new market, an undertaking in which, I may observe, Nawab Jan appears to have been wholly successful, and which would supply a motive for aggression against him and not on his part, the fact that Norool Hoodda had petitioned to take out letters of administration to the estate of Gholam Rohman, deceased husband of Jurreefunnissa, and the relationship between Nawab Jan and Norool Hoodda, a fact never denied.

A former conviction is also alluded to as tending to implicate Norool Hoodda in the present offence.

The mere existence of relationship between the parties and the assertion of a right under Act XXVII. of 1862 are surely not facts supplying or even suggesting an adequate motive for so grave an offence—much less as serving, as the Judge tells the Jury, to connect any of the prisoners with the commission of the offence. The allusion to the former conviction of one of the prisoners was highly improper, and yet it was

unfortunately just one of those remarks which, of all others, would have very great weight with a native Jury.

As already observed, my learned brother admits that the charge is an unsatisfactory one. I go much farther. I am of opinion that, in a case of this importance, when powerful arguments were doubtless urged upon the attention of the Jury in favor of opposite views of the question, it was of the utmost importance that the summing up of the Judge should be accurate; that it was his duty to have directed the Jury as to the legal weight which ought to be attached to the evidence, as well as to have correctly stated what was, and what was not, legal corroboration of the approver's statement. Not having in my opinion done so, the prisoner has been prejudiced, and he is entitled to his discharge. Under the authority of the decision in the case of Elahee Buksh, I am not necessarily bound to send back the case for a new trial. There was evidence which is valid in law, *viz.*, the uncorroborated testimony of the approver. On the evidence of this witness, if the trial had been with Assessors, I should on appeal have not hesitated to acquit the prisoner. But, for reasons above stated, there was in my judgment error in law in the summing up of the evidence which prejudiced the prisoner, and caused a failure of justice, such as to warrant this Court in setting aside the verdict of guilty, and directing his discharge.

The above remarks apply generally to the case of the prisoner Koodeeram Mitter. This prisoner is the naib of the prisoner Nawab Jan, and it is said that he acted under the orders of his employer. Against this prisoner, there is the evidence of the approvers Koodeeram and Baboo Sheik. This evidence has not been properly submitted to the Jury, and they have been directed to accept, as corroborative of this evidence, facts which do not legally corroborate it. I have entered into this part of the case in treating of the case of the prisoner Nawab Jan. It is not necessary to repeat my remarks. The evidence of the two mookhtars Denoo Sing and Kalichunder Chuckerbutty, which the Judge directs the Jury to consider as against this prisoner, do not in any way connect the prisoner with the particular offence with which he is charged. The conversation said to have passed between him and the mookhtars may have been about a totally different transaction. There is nothing in the conversation to connect the prisoner with the case before the Court.

As this prisoner has been equally prejudiced with the prisoner Nawab Jan by the defects and omissions in the charge, he is in my opinion fairly entitled to his discharge, which I would accordingly order.

Macpherson, J.—As regards the prisoners Nawab Jan and Koodeeram Mitter, I think there has been a misdirection which makes it necessary that the conviction of, and sentence on, each of these prisoners should be set aside.

In the case of Elahee Buksh (V. Weekly Reporter 80, Criminal), which was tried by a Full Bench, it was laid down (page 87) by the Chief Justice, the majority of the Court concurring, that, "if a Judge, instead of advising a Jury not to convict upon the mere uncorroborated evidence of an accomplice, were to advise them to convict upon such evidence, or were to tell them that the uncorroborated evidence of an accomplice under a tender of pardon was admissible, and that it was for them alone to form their opinion upon it, a conviction founded upon such evidence would be legal, and that such evidence without corroboration might be acted upon with as much safety as that of any other witness; *the error in the direction would form a good ground of appeal.*" And, again, that "*it would be an error in summing up if a Judge, after pointing out the danger of acting upon the uncorroborated evidence of an accomplice, were to tell the Jury that the evidence of the accomplice was corroborated by a fact which did not amount to any corroboration at all.*"

If the case as against Nawab Jan be looked upon as a case in which the conviction was based exclusively on the uncorroborated evidence of the accomplice, Rohomut Sheik, the conviction is clearly bad under the rule laid down by the Full Bench in the first of the two passages just quoted; because the Judge did not, in his summing up, direct or advise the Jury that they ought not to convict upon the uncorroborated evidence of the accomplice. If, on the other hand, the case is looked on as one the conviction in which is based upon the evidence of the accomplice as corroborated by the evidence (which appears to be the view which the Sessions Judge intended the Jury to take of it), then the conviction is, in my opinion, bad, because the evidence of the accomplice is not in fact corroborated by any evidence at all.

Vol. VIII. There is no corroboration such as adds to the weight of the accomplice's evidence against Nawab Jan; because there is no evidence apart from that of the accomplice which identifies the prisoner with the commission of the offence with which he is charged; nothing which distinctly goes to prove that he was in any way connected with the commission of the principal offence. Facts which do not shew the connection of the prisoner with the commission of the offence with which he is charged are no corroboration in the sense in which the word is used in such cases, although they may tend to shew that certain portions of what the accomplice says are true.

It is said that, as it is proved by many witnesses that, when the house was attacked, the attacking party made use of Nawab Jan's name, this is corroboration of the accomplice's story. But, in my opinion, these cries cannot be used against Nawab Jan. The case for the Crown is that Nawab Jan was at the time many miles off at Kulna, and, that being so, I cannot see that cries used by the latials are evidence against him. There is nothing in such cries which necessarily brings the offence home to the prisoner. The cries might possibly have been used for the purpose of misleading those attacked, even if the attacking party had had no connection whatever with Nawab Jan.

I think there has been a misdirection and a failure of justice in consequence. It is contended that the summing up is substantially correct, and that the prisoner has not been prejudiced by the errors which have been committed. In this view I cannot concur. The Sessions Judge was bound to follow the rule laid down by the majority of the Full Bench in Elahee Buksh's case. This he has not done, and I consider that the summing up was very substantially wrong. Such being the case, it is impossible for one not to hold that the prisoner has been thereby prejudiced. I, therefore, think the prisoner Nawab Jan should be discharged.

For similar reasons, I am of opinion that Koodeeram Mitter also ought to be discharged. Two accomplices gave evidence against him. In other respects, his case resembles that of Nawab Jan, and is governed by the like principles.

The 24th June 1867.

Present :

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges.*

False Evidence—Evidence—Misdirection.

Queen versus Sheikh Tufani.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of false evidence.

A prisoner's inability to say where his son was on the 4th Pous is no evidence on which to direct a Jury to convict him of false evidence for saying that on the day previous (3rd Pous) his son was ill at home.

Hobhouse, J. THE prisoner was charged with intentionally giving false evidence in a stage of a judicial proceeding, was found guilty by the Jury, and was sentenced by the Judge to one year's rigorous imprisonment.

The alleged false statement was laid in the following words, *viz.*, "that the prisoner had falsely stated that on the 3rd of Pous his son was at his (prisoner's) house sick of a fever," and it arose in this way.

The said son had charged a certain person with an assault upon him, and the 3rd Pous was fixed as the day of hearing; but on that day the prisoner came forward, and asked for a postponement of the case, on the ground of his son's sickness; and, on the requisition of the Magistrate, the prisoner made declaration on solemn affirmation of that sickness in the words now charged against him as false.

There is not on the record any evidence to shew whether or not the prisoner's son was sick of fever at prisoner's house on the 3rd Pous. The only evidence put before and believed by the Jury was that which went to show that on the 4th Pous the prisoner's son was not at home sick in prisoner's house.

This being the only evidence, the Judge charged the Jury in the following words:—

"The charge against the prisoner is that he intentionally made a false statement before the Magistrate at Moonsheegunge by stating that his son Fyzoo was sick at home that day, the 3rd Pous. An enquiry was made

next morning, and the witnesses state that, when they went with the constable to his house, he himself said that his son was not at home, and he could not tell where he was to be found. What prompted the prisoner to adopt the course he did, is not easy to see; but with that you have no concern; if you believe that the witnesses are speaking the truth when they say that the prisoner on the morning of the 4th could not tell where his son was to be found, there is presumptive evidence of the strongest character that his statement of the previous day was a deliberate false statement."

In these words there is a manifest misdirection and consequent error in law, for it is obvious that the prisoner's inability to say where his son was on the 4th Pous is not only no presumptive evidence, but is no sort of evidence at all, that prisoner spoke falsely when he said that his son was ill at home on the 3rd Pous, the day previous.

The question was, was prisoner's son on the 3rd Pous not sick at home, and, if so, did prisoner know that his son was not so sick at home, or not believe that he was so.

There was no evidence at all bearing on this question.

There was therefore no evidence to go to the Jury on the real point of the prisoner's guilt, and there was a manifest misdirection and error in law in the direction to the Jury to convict on what was not evidence.

Under these circumstances, I think that the conviction must be set aside, and the prisoner discharged.

Jackson, J. I concur.

The 25th June 1867.

Present:

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges.*

Section 218, Penal Code--False Evidence.

Criminal Jurisdiction.

*Reference under Circular Order No. 27,
dated 17th June 1863.*

Queen versus Shama Churn Roy.

Revised under Section 404, Code of Criminal Procedure.

The intention is an essential ingredient in the offence contemplated by Section 218 of the Penal Code.

The making of a false return of service of summons is an offence punishable, not under Section 181, but under Section 103 of the Penal Code, and is cognizable by the Court of Session alone.

Jackson, J. This is a reference which comes before us under somewhat peculiar circumstances. Shama Churn Singh Roy, a peada of the Deputy Collector's establishment at Serampore, was convicted before the Deputy Magistrate of the Division on two charges under Sections 181 and 218 of the Indian Penal Code, and sentenced (for his two offences) to rigorous imprisonment for 6 months. He appealed to the Judge, by whom the conviction and sentence were affirmed, the Judge treating the case as one in which only facts were in issue.

After this, the Magistrate of the District, being of opinion that the conviction was bad in law, requested a reference to this Court, and the Judge has made the reference in the form prescribed by Circular Order, dated 17th June 1863, No. 17.

The facts are these: one Gunesch Mundul had been named as a witness for the defendant in a suit for a hulooleut before the Deputy Collector, Baboo Gopal Chunder Mookerjee, and summons was directed to him, which was entrusted for service to the peada, Shama Churn.

The latter afterwards made return to the effect that he had served the summons on Gunesch; and, as Gunesch did not appear, the Deputy Collector proceeded against him by prosecution under the 174th Section of the Indian Penal Code. Gunesch denied the charge.

In the investigation of *this case*, in which Shama Churn was examined as a witness (19th February), the Deputy Magistrate ascertained that Shama Churn had not gone to serve the summons at all, but that, it had been taken to the house of Gunesch by Shama Churn's brother, Huboo; and that as Gunesch could not be found, personal service was not effected.

He, the Deputy Magistrate, thereupon at once put Shama Churn on his defence for making (19th February) a false return and a false statement on oath. Shama Churn denied

Vol. VIII. the charges, and named witnesses in his defence. These men were summoned and examined (20th February), but the Deputy Magistrate did not believe them, and convicted Shama Churn on both charges (28th February.)

It is quite clear that the conviction on both heads is erroneous.

That under 218 is wrong, because the facts do not constitute the offence contemplated. The intention is an essential ingredient, and that intention in this case appears altogether wanting. From the ground on which the Deputy Magistrate put the conviction, as well as from the facts in evidence, it would appear that there was no intention, and that the Deputy Magistrate found no intention of the kind mentioned in the Act, and the Deputy Magistrate evidently referred to what is, no doubt, a most reprehensible practice of serving-peons delegating their duties to other parties, and reporting as if they had performed them in person.

The conviction under 181 is wrong, because the offence with which the prisoner was chargeable was clearly the giving false evidence in a judicial proceeding, an offence under Section 193 cognizable by the Court of Session alone. This would be equally the case, whether the evidence was given on the enquiry before the Deputy Magistrate or in the suit before the Deputy Collector.

This is a point upon which the Judge of Hooghly was instructed in a letter from this Court, dated 7th May 1866.

The conviction must therefore be set aside, and the prisoner discharged.

The 26th June 1867.

Present :

The Hon'ble G. Loch, *Judge.*

Receiving of stolen property—Complaint.

Queen versus Gowree Singh.

Committed by the Magistrate, and tried by the Sessions Judge of Bhargulpore, on a charge of dishonest retention of stolen property.

The police may, without any formal complaint, apprehend any person found with stolen property.

THE objections raised to the conviction are apparently without foundation. There is no necessity for any formal complaint in such cases. By Section 68 of Act XXV. of 1861, the Magistrate has authority, without any complaint, to take cognizance of any offence which may come to his knowledge; and, by Clause 2, Section 100, the police may apprehend any person against whom a reasonable suspicion exists of his having been concerned in any such offence, *i. e.*, those mentioned in Column 3 of the Schedule attached to the Act; and Clause 5 of the same Section says that the police may apprehend any person found with stolen property. It would, as the Judge remarks, have been impossible to identify the property, *viz.*, ghee, unless it had been kept in the original jars, and then those jars might have been identified; but this is immaterial in the present case, for the prisoner confessed to the Magistrate that he had received the ghee from persons who told him that it had been acquired by dacoity. His own confession, therefore, convicts him of a guilty knowledge. I reject the appeal.

The 27th June 1867.

Present :

The Hon'ble G. Loch, *Judge.*

Murder—Culpable Homicide not amounting to Murder—Grievous Hurt.

Queen versus Madur Jolaha.

Committed by the Magistrate, and tried by the Sessions Judge of Bhargulpore, on a charge of culpable homicide not amounting to murder.

Explanation of the difference between murder, culpable homicide not amounting to murder, and grievous hurt.

It appears to me that the Judge misunderstands the nature of the offence of culpable homicide as set forth in the Penal Code.

Culpable homicide is murder if committed under any of the circumstances mentioned

in the 4 Clauses of Section 300. The offence becomes "culpable homicide not amounting to murder," when it is accompanied by any of the Exceptions mentioned in Section 300.

In both offences, the law supposes that there is an *intent to kill* or a *knowledge that death would result from the act*, but the more heinous features of the offence of murder disappear when any of the Exceptions noted in Section 300 intervene, and the crime then becomes "culpable homicide not amounting to murder." When there is no intent to kill, or knowledge that death is likely to follow the act, the offence is neither murder nor culpable homicide not amounting to murder, but is reduced to "grievous hurt." The Judge will observe that the Penal Code contains no such offence as culpable homicide, as was understood by that term before the Code came into operation. Under the former procedure, the prisoner would have been very properly convicted of culpable homicide; but now, as the Judge finds that the prisoner only intended to inflict injury on his wife, or knew that the blow must have that effect, the offence is one of grievous hurt, and not of culpable homicide not amounting to murder. The conviction should have been of the former offence; but I see no reason to interfere with the sentence passed upon the prisoner, and dismiss the appeal.

The 29th June

The Hon'ble W. S. Seton-Karr and
C. P. Hobhouse, *Judges*.

Hurt—Grievous Hurt—Evidence—Admission.

Queen versus Bysagoon Noshyo.

Committed by the Magistrate, and tried by the Sessions Judge of Dinagepur, on a charge of voluntarily causing grievous hurt, and culpable homicide not amounting to murder.

Where a wife died from a chance-kick in the spleen inflicted by her husband on provocation given by the wife, the husband not knowing that the spleen was diseased, and showing by the blow itself and by his conduct im-

mediately afterwards that he had no intention or knowledge that the act was likely to cause hurt endangering human life HELD that the husband was guilty of an offence under Sections 319 and 321 of the Penal Code, and not of an offence under Sections 320 and 322.

An admission by the husband in the presence of several witnesses that he had killed the wife, and that she died after receiving the kick, was held to be direct evidence against him.

Hobhouse, J. The prisoner who appealed in the case has been found guilty, by the Sessions Judge and Assessors below, of voluntarily causing grievous hurt, and has been sentenced by the Sessions Judge to five years' rigorous imprisonment.

I am of opinion that this finding and sentence are not good in law.

The facts proved in evidence are that the prisoner's wife, the deceased, angered him by negligently permitting some cattle to eat the prisoner's "dhan;" that a quarrel thereupon ensued, that, in the course of that quarrel, the prisoner struck his wife a blow on the face, and gave her a kick in the spleen, and that this kick ruptured the deceased's spleen, so that she died immediately.

Now, there is nothing to show that the prisoner knew that his wife's spleen was diseased; on the contrary, the medical evidence goes to show that he was not likely to have known it, and, on the other hand, there is evidence to show that the deceased gave provocation; and it is a presumption which has not been rebutted that, but for the fact of the spleen being diseased, the kicks given would not have caused death, and that prisoner is therefore in the position of a person who has committed an act falling within the last provision of Illustration (b), Section 300, Indian Penal Code.

He did intend bodily injury, but not murder: nor can it, I think, be said that he intended grievous hurt, for it cannot be said that he intended to cause, or knew that he was likely to cause, a hurt endangering life within the meaning of Sections 320 and 322. What he did was to strike a chance blow on provocation given, the striking of which he immediately repented, for he was found with the woman in his arms succouring her.

I would rather say that his act was that of a person who intended to cause hurt within the meaning of Sections 319 and

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Vol. VIII. 321, Indian Penal Code, and I would find him guilty under Section 323, and sentence him to one year's rigorous imprisonment.

I observe that the Sessions Judge says that there is no direct evidence against the prisoner; but I find that prisoner admitted in the presence of several witnesses that he had kicked the deceased, and that she had died after receiving the kick, and this, I would remark, is direct evidence against the prisoner.

Seton-Karr, J.—I concur. A sentence of one year is ample for the offence which the prisoner has committed.

The 29th June 1867.

Present :

The Hon'ble W. S. Seton-Karr, *Judge.*

Sessions record—Principal documents.

Queen versus Sheikh Bheekun.

Committed by the Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of fraudulently using as genuine a forged document.

The principal documents in a Sessions case should be put in a prominent place on the record, and not buried in a mass of papers.

I HAVE to complain, as I have complained in other cases from other districts, that the two principal documents on which the whole case turns have not been put in a prominent place on the record, but have been buried in a mass of papers.

Papers said to be forged or tampered with should be put with the evidence, taken at the Sessions, in so conspicuous a place as to be available at once.

I do not understand on what grounds the Assessors would acquit the prisoner.

The evidence of Wahed Ali and Sukhawut Hossein and others is precise and quite un rebutted, and the prisoner obviously used the documents, shewn to be forgeries, for his own benefit and with a corrupt intention.

The conviction under Section 471 seems correct and proper, and the punishment is appropriate.

The appeal is rejected.

The 29th June 1867.

Present :

The Hon'ble C. P. Hobhouse, *Judge.*

Mischief by Fire—Charge.

Queen versus Durbarro Polie.

Committed by the Magistrate, and tried by the Sessions Judge of Dinagepore, on a charge of committing mischief by fire.

In a case of mischief by fire with intent to cause the destruction of a dwelling-house, the charge should lay the intent as an intent to cause the destruction, not of a house simply, but of a house used as a human dwelling.

THE prisoner is clearly proved guilty of the offence of committing mischief by fire, intending to cause the destruction of complainant's dwelling-house, and has been appropriately punished.

The appeal is, therefore, dismissed.

I observe that the charge lays the intent as an intent to cause the destruction of a "house" simply.

I would point out that this is not a sufficient charge, for the destruction must be a destruction, not of a "house" simply, but, as in this case, of a house "used as a human dwelling."

The 1st July 1867.

Present :

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges.*

Jurisdiction—False Evidence.

Reference by Mr. A. J. Elliot, Sessions Judge of Tirhoot, to the Appellate High Court, dated the 15th June 1867.

Queen versus Heeramun Singh.

The offence of giving false evidence in a stage of a judicial proceeding is not cognizable by an Assistant Magistrate.

A Sessions Judge in appeal can quash an illegal conviction by an Assistant Magistrate in such a case.

Case.—ON looking at the judgment of the Assistant Magistrate, it is clear that the prisoner should, if found guilty of any offence, have been sentenced under Section 193.

The offence he has been convicted of is the intentionally giving false evidence in a stage of a judicial proceeding—an offence not cognizable by the Assistant Magistrate. That the appellant did intentionally give false evidence in a stage of a judicial proceeding, is *prima facie* established.

This is not a case falling under Section 427, Act XXV. of 1861, as the charge as laid and pleaded to, and the order of the Magistrate as issued, are under Section 181, Act XLV. of 1860.

Under the above circumstances, I recommend that the sentence of the Assistant Magistrate be quashed as illegal.

The Assistant Magistrate has been directed to release the prisoner, appellant, on bail, pending orders of the High Court.

In the absence of the Assistant Magistrate on leave, the papers of the case were sent to his successor, who has submitted no explanation on the subject.

Jackson, J. The conviction in this case is erroneous. The case ought to have been dealt with as an offence under Section 193 of the Indian Penal Code. The proceedings of the Magistrate are set aside, and he is directed to proceed according to law.

We are of opinion that this order might have been passed by the Judge himself, the case being before him on appeal, and all questions of law and fact arising out of the case being cognizable by him.

The 1st July 1867.

Present :

The Hon'ble L. S. Jackson and
C. P. Hobhouse.

Separate convictions and sentences—Mischief and Theft—House-breaking and Theft.

Reference from Lieutenant-Colonel J. T. Davis, Judicial Commissioner of Chota Nagpore, to the High Court, dated the June 1867.

Queen versus Sahrae and others.

Separate convictions and sentences under Sections 429 and 379, and under Sections 457 and 380 of the Penal Code, were set aside; and the convictions under Section 429 in the former case, and under Section 457 in the latter, allowed to stand.

Case.—In the first case the prisoners Khoodoon and Boodeea have been convicted by Lieutenant E. G. Lillingston, Assistant Commissioner, Lohardugga Division, with the powers of a Magistrate, of mischief in killing a buffalo, and theft in afterwards stealing the carcass of the said buffalo, and have been sentenced separately under Sections 429 and 379, Indian Penal Code, to rigorous imprisonment for one year under each Section; but it appears to me that the mischief and theft are parts of one and the same offence, and, therefore, that the conviction and sentence under one head should be quashed as illegal.

In the other two cases the Moonsiff of Lohardugga, with the powers of a Subordinate Magistrate, 1st Class, has convicted the prisoners of house-breaking by night in order to commit theft, *et/ce* of theft in a building, and has sentenced them each to rigorous imprisonment for six months under Section 457, and similar imprisonment for three months under Section 380, Indian Penal Code; as the conviction under Section 380, Indian Penal Code, in both cases is illegal, it should be set aside.

Jackson, J. The separate convictions and sentences under Section 379 in the first case, and Section 380 in the second, are to be set aside as proposed. The convictions under Section 429 in the first instance, and under Section 457 in the second instance, are to stand.

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The 2nd July 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Theft (by hired boatman).

Queen versus Bawool Manjee.

Committed by the Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of causing disappearance of evidence, &c.

A hired boatman does not come within the definition of a clerk or servant under Section 381 of the Penal Code. Theft by such a person on board a boat comes under Section 380.

Kemp, J.—This prisoner has been convicted, under Sections 201 and 381 of the Indian Penal Code, and sentenced to seven years' transportation for each offence. The conviction under the first charge is good, and may stand; but the conviction under Section 381 is illegal.

The prisoner was a hired boatman, and does not come within the definition of a clerk or servant. Section 381 is therefore wholly inapplicable. The theft was committed on board a boat, and comes under Section 380 of the Code. As the case is a very bad one, the prisoner only escaping the graver charge of murder, from the fact that the evidence of the approver-witness does not implicate him, though we have no doubt that he took a part more or less active in the crime, the sentence under Section 380 will therefore be the maximum sentence which the law allows, *viz.*, seven years' rigorous imprisonment in transportation under Section 59.

The 6th July 1867.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. P. Hobhouse,

Jurisdiction—High Court (as a Court of Record)—Contempt of Court—Presents to officers of Court by successful suitors.

In re Abdool and Mahtab, Chupprasees of the High Court.

The High Court, as a Court of Record, has the power of summarily punishing for contempt.

Any officer of the High Court, who asks for or accepts a present from any person in whose favor judgment is pronounced by the Court, is guilty of a gross breach of duty and a contempt of Court.

So also any person who offers or gives such present is guilty of a contempt of Court.

The *Chief Justice*, in addressing the prisoners, said :

It has been brought to my notice that you Abdool and Mahtab, being officers of this Court and chupprasees assigned to attend upon Mr. Justice Hobhouse, have applied for and received presents from suitors or mooktears of suitors in consequence of judgments having been given in their favor by the Court in which Mr. Justice Hobhouse was one of the Judges.

The *Chief Justice* then asked the prisoners separately whether they had anything to say why they should not be punished for so doing.

The prisoners separately answered in the negative, and left the case in the hands of the Court.

The *Chief Justice*, addressing the prisoners, said : Your conduct in this case having been brought to my notice by Mr. Justice Hobhouse, I requested Mr. Field, the Officiating Registrar of the High Court, to make an affidavit of what took place before him. He says that, on the 2nd day of July 1867, he was directed by the Hon'ble Mr. Hobhouse to take down the statements of you, Abdool and Mahtab; that he did accordingly take down your statements; and that the written statements annexed to his affidavit contained a true account of the statements which you made.

You, Abdool, stated that you and Mahtab were disputing; that you were in the habit of asking money from suitors who win their cases; that they (the suitors) do not give you anything unless you ask; that you got in all 8 annas or a rupee; that in some months you got nothing; that you got a couple of annas from each person; that the chupprasees all did the same; that the jemadar sometimes gets *bukshish* as well as others; that Mahtab got his fair share; that they (meaning the suitors) never gave you anything until they were happy at having won their cases; and that you did not ask beforehand, for you knew you would not get it.

You, Mahtab, stated that you were fighting with Abdool; that you had been at feud with him for a long time; that you told the Hon'ble Mr. Hobhouse that Abdool took

all the *bukshish*, and would not give you your share; that you got two or four pice from the mooktears of the suitors who win their cases to buy sweetmeats; that you got this *douceur* after the cases are disposed of; that you change week about, two men staying in the house and two men remaining in Court; that Abdool gets nothing at the house; that it is at the Court only that you get it; that you do ask for it; that they (the suitors) would never think of giving anything unless you asked for it; that there was a dispute about eight or ten days ago at the lodging; that you are now at Court, and Abdool at the house; that he and you are occasionally both on duty at *cutcherry* (that is, at this Court); that you are newly appointed, and he an old hand; that you have been eight months employed; that you never took anything yourself, but that the *jemadar* and Abdool have occasionally given you a few pice as your share; and that only eight or ten annas altogether are made during the month.

There can be no doubt from these statements that both of you have applied to suitors of this Court, who have been successful in the cases which have been decided by a Court of which Mr. Justice Hobhouse is one of the Judges, for *bukshish* or presents in consequence of those decisions. You are both officers in the pay of Government, and both public officers on the establishment of this Court; and although, according to the duty which has been assigned to you, you are to attend on Mr. Justice Hobhouse, you are not the less public officers of this Court and public servants within the meaning of the Penal Code. Although, therefore, you were the officers attending upon Mr. Justice Hobhouse, and the presents which you received had relation to judgments passed by a Court in which he was one of the Judges, your offence is not an offence against that Judge individually, but an offence against the High Court.

If I thought it necessary, I should commit you for trial for an offence punishable under Section 165 of the Penal Code; and, if you should be convicted of an offence under that Section, you would be liable to imprisonment for a term which might extend to two years with or without fine. But, as this is the first time since the High Court was established that an offence of this nature has been brought home to an officer of this Court, I shall not resort to such an extreme proceeding.

The offence of which you have been guilty is, beyond all doubt, a contempt of the High Court, for which the Court has power to punish you without sending you for trial to the ordinary Courts of Criminal Judicature. This Court, by the express terms of the Letters Patent, is a Court of Record; and there can be no doubt that every Court of Record has the power of summarily punishing for contempt.

Among the instances given by Blackstone in the 4th Vol. of his Commentaries, page 284, are those committed by the officers of the Court for abusing the process of law, or deceiving the parties by any acts of oppression, extortion, collusive behaviour, or culpable neglect of duty; "for," he adds: "The malpractice of the officers reflects dishonor on their employers, and, if frequent or unpunished, creates among the people a disgust against the Courts themselves."

I wish to state publicly, and to have it distinctly understood, that any officer of this Court, who asks for or accepts a present from any person in whose favor a judgment is pronounced by this Court, is guilty of a gross breach of duty, and a contempt of this Court. It matters not whether the sum received is large or small; whether it is for services performed or to be performed, or wholly irrespective of any services rendered by the officer. It matters not whether the present is given in consequence of a judgment pronounced by the Judge upon whom it is the peculiar duty of the officer to attend, or to which such Judge was a party, or in consequence of a judgment pronounced by any other of the Judges of the Court. It matters not whether it is before judgment or after judgment. The mere fact of asking for, or receiving, under any circumstances whatever, any present, reward, or gratuity, in consequence of any judgment or proceeding of any kind in this Court or in any way connected therewith, is punishable as a contempt of this Court.

The offence is not confined to those who ask or receive, but it extends equally to those who offer or give. A fruitless request is as great an offence as an actual acceptance, and an offer which is refused is punishable in the same manner as if the present or reward were accepted.

In Martin's case, in which a person wrote a letter to the Lord Chancellor, stating that he had been threatened with a bill in Chan-

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VIII. cery, and enclosing a Note for £20, of which he begged the Chancellor's acceptance, the offender was punished for a contempt of Court.

To offer money to an officer of the Court, though, perhaps, not so grave an offence as that of offering it to a Judge, is beyond all doubt a serious contempt of the Court to which that officer is attached.

A suitor who seeks for justice is not, as soon as he succeeds, to be harassed and annoyed by these requests for presents on the part of the officers of the Court. I am determined, as far as lies in my power, to put an end to all practices of this kind in this Court, either on the part of the officers, or of the parties or their mooktears. Every suitor, therefore, may be certain that any charge made upon him for presents to any officer of this Court is wholly unwarranted, and that the party making the charge is liable to severe punishment at the hands of the Court.

As this is the first case in which any officer has been brought before the Court for punishment, I think a very lenient sentence will suffice. I by no means wish it to be understood that the Court will consider such a punishment adequate if, on any future occasion, an officer or other person be brought before the Court for an offence of a similar nature.

You are liable to fine or imprisonment or to both. We have considered anxiously what punishment should be awarded. You are poor men, and I do not wish to deprive you or your families of any part of your wages, and therefore I shall not punish you by fine or add fine to imprisonment.

You, Abdool, have been employed as a public officer for a much longer time than Mahtab. I therefore order that you be

imprisoned in simple imprisonment* in the Presidency Jail of Calcutta for the term of 14 days, inclusive of this day.

You, Mahtab, having, as I understand, been employed as an officer of this Court for a period of 8 months only, I order that you be imprisoned in simple imprisonment* in the same Jail for a period of 10 days, inclusive of this day.

You are both dismissed, and your names will be registered in order that you may never be again employed as officers of this Court. I trust that this sentence will operate as a warning to others.

* A copy of the warrant which was issued by the Court is subjoined for future reference and guidance.

To Thomas Willis (Bailiff of the High Court)
and

To the Superintendent of the Presidency Jail in Calcutta and to all Police and other Peace Officers whom it may concern.

Whereas in a Division Court of the High Court of Judicature at Fort William in Bengal, holden on the 6th day of July 1867, before the Hon'ble Sir Barnes Peacock, Kt., Chief Justice, and the Hon'ble C. P. Hobhouse, one of the Judges of the said Court, it was considered by the said Division Court that Abdool and Mahtab, chupprasees of this Court, in attendance upon the Hon'ble C. P. Hobhouse, one of the Justices of this Court, were severally guilty of a contempt of the High Court, and it was ordered and adjudged by the said Division Court that the said Abdool and Mahtab, for their said contempts of Court, be imprisoned in the Presidency Jail of Calcutta in simple imprisonment for the periods following, that is to say, the said Abdool for a period of fourteen days from the 6th day of July 1867 inclusive of that day, and the said Mahtab for the period of ten days from the said 6th day of July 1867 inclusive, the said Division Court having lawful power and authority in that behalf.

This is, therefore, to authorize you, the said Thomas Willis, forthwith to take and convey the said Abdool and Mahtab to the Presidency Jail of Calcutta, and to deliver them, together with this warrant, into the custody of the Superintendent of the Presidency Jail; and you, the said Superintendent of the said Presidency Jail, are hereby authorized and required to receive the said Abdool and Mahtab into your custody, and to keep them safely in the said Jail in simple imprisonment for the said periods of 14 days and 10 days respectively, and after the discharge of the said Abdool and Mahtab forthwith to return this warrant to the High Court, together with a certificate endorsed thereon and signed by you, the said Superintendent, showing how the same has been executed; and all officers of police and other peace officers are hereby required to aid and assist the said Thomas Willis in the execution of this warrant, if required by him so to do.

Given under our hands and the seal of the said High Court this 6th day of July 1867.

The 8th July 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Section 62, Penal Code—Forfeitures.

Queen *versus* Kripamoyee Chassanee and
another.

*Committed by the Magistrate, and tried by
the Sessions Judge of Beerbhoom, on a
charge of causing miscarriage.*

Section 62 of the Penal Code, which provides for forfeitures, limits them to cases when the parties shall have been transported or sentenced to imprisonment for at least seven years.

Glover, J.—BOTH appellants in this case pleaded not guilty at the Sessions. There is no question that their confessions were voluntary, and there is consequently no ground for this appeal.

But it appears to me that the Sessions Judge has acted *ultra vires* in directing certain property, given by one prisoner to the other as payment for procuring the medicines necessary to procure abortion, to be escheated to the State.

Section 62 of the Penal Code, which provides for forfeitures, limits them to cases where the parties shall have been transported or sentenced to imprisonment for seven years at least; so that, as these prisoners have been sentenced to three years' rigorous imprisonment only, the sentence would not apply.

It does not appear, moreover, how the Sessions Judge has found that Kripamoyee did make the present in question to Modoo Harin, for he recorded no evidence, finding the prisoners guilty on their own pleas.

I would reverse this portion of the Sessions Judge's order.

Kemp, J.—I concur.

The 8th July 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Kidnapping—Dishonestly taking property from person of kidnapped child.

Queen *versus* Shama Sheikh.

*Committed by the Magistrate, and tried by
the Sessions Judge of Moorshedabad, on
a charge of kidnapping, &c.*

The offence described in Section 363 of the Penal Code is included in that described in Section 369, the kidnapping and the intention of dishonestly taking property from the kidnapped child being included in the latter Section.

Kemp, J. THE prisoner has been convicted of kidnapping under Section 363, and of kidnapping with the intention of taking dishonestly moveable property from the person of the kidnapped child, under Section 369. Separate sentences have been passed under each Section.

The trial was with a Jury. The charge to the Jury seems to be a very proper one; but we think that the offence described in Section 363 is included in that described in Section 369, the kidnapping and the intention of dishonestly taking property from the person of the child being included in the latter Section.

The conviction and sentence under Section 363 is quashed.

The 8th July 1867.

Present :

The Hon'ble C. P. Hobhouse, *Judge.*

Evidence—Admission of accused—Police papers.

Queen *versus* Bussiruddi and others.

*Committed by the Magistrate, and tried by
the Sessions Judge of Jessore, on a
charge of dacoity, &c.*

The admission of an accused cannot be taken to be corroborative evidence, or any evidence at all, against any body other than himself.

Vol. VIII. Police papers ought not to be taken judicial notice of either as evidence or consulted in order to test evidence.

THERE is no ground shown to me for interfering with the judgment and the sentences on the prisoners, appellants; and the evidence on record clearly establishes their guilt.

I, therefore, dismiss the appeal; but I would call the Judge's attention to certain errors in law, which, if not noticed, may be committed by him again in prejudice, either of accused persons, or of justice generally.

In one part of his judgment he remarks as follows:—

"The Assessors would acquit Yassin on the ground of his having been recognized by only one witness; and, were the evidence of that one witness uncorroborated, I should hesitate to accept it as sufficient for his conviction; but, when it is so strongly corroborated by the confession of Shumboo Malo * * * * * and the evidence regarding recognition being corroborated by Shumboo's confession"

On this I have to note that the Judge has erred in considering that the admission of an accused can be taken to be corroborative evidence, or indeed any evidence at all against any body other than himself; and, this being so, had I been disposed to doubt, as I do not doubt, the testimony of the man Nitai Ghose, I should have been compelled to acquit the prisoner Yassin.

Again, the Judge was in error in taking any judicial notice of the police papers.

He says: "In order to test their evidence, I have inspected the police papers, and I find that they all mentioned the names of these individuals when examined by the police, though Olakmonee, instead of calling Toriboollah and Tunnoo by their names, spoke of them as the sons of Sonaoolla."

Section 154, Criminal Code Procedure, distinctly declares that police papers are not to be treated as evidence; but, when the Judge, "in order to test evidence," consults such papers, it is clear that he does in a manner treat them as evidence, and in this case they were apparently so treated to the prisoner's prejudice.

The 8th July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Riot—Duty of Police.

Criminal Revisional Jurisdiction.

Revision under Section 404, Code of Criminal Procedure.

(Queen versus Damoo Singh.

Where a man is grievously wounded in a riot, the police are bound to act without taking into consideration who was the aggressing party. In the discharge of their duties, and in the absence of any proof that they exceeded their duty, the police were held entitled to the protection of the Court.

Kemp, J.—THIS case comes up confined to points of law.

Mr. Allan for the petitioner urges that the police were acting in concert with the auction-purchaser, who was attempting to take khas possession of the village of Jowee, contrary to the terms of the perwannah of the Civil Court, which awarded possession only to the extent of receiving the rent from the mokurureedar.

The perwannah was confined to giving possession of the village by affixing an ishtehar, and by beat of drum. The peon accompanied by a gomastah on the part of the decreedar went to the spot, and found some 30 men collected in the aforesaid village apparently in the cutcherry. The gomastah was very seriously wounded, and reinforcements were sent for, and obtained by the mokurureedar.

On a charge being made before the head constable, he, acting within the scope of his authority, the offence being one in which he could arrest without warrant, proceeded to the spot to rescue the wounded man, and to enquire into the cause of the riot. He was pulled off his horse and beaten, subsequently a further body of police were resisted and insulted, and it was only after blank cartridge had been discharged that the rioters dispersed.

The petitioner, who took a prominent part in the riot, has been committed under Section 152, and sentenced to two years' imprisonment.

Whether the auction-purchaser went beyond his right under the decrees is not the

question before us. A man was grievously wounded, and the police were bound to act without taking into consideration who was the aggressing party. In the discharge of their duties, and in the absence of any proof that they exceeded their duty, the police are entitled to the protection of this Court, and we think that, taking into consideration the violent conduct of the petitioner and his party, which, but for the forbearance of the police, when they were represented by numbers bringing them on something like equal terms, alone prevented a very serious riot attended with loss of life taking place, we shall not interfere with the sentence.

Appeal rejected.

The 8th July 1867.

Present:

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges*.

Nuisance.

Criminal Revisional Jurisdiction.

Reference under Section 434, Code of Criminal Procedure.

Queen versus Pitti Singh.

Where a Magistrate has commenced proceedings under Section 308 of the Code of Criminal Procedure, he is not at liberty to proceed otherwise than in conformity with the rules laid down in Chapter XX. of the Code.

Jackson, J. WE are of opinion that the Joint Magistrate's order was unwarranted, and must be set aside.

He contends that it was authorized by Section 62, Code of Criminal Procedure, and alleges that it was made under that Section. Upon this point, as far as we can judge, the Joint Magistrate has deceived himself: for, while his very concise proceedings in no way point to an emergency of the kind contemplated in Section 62, nor take the form of proceedings under that Section, they on the other hand clearly indicate a case of unlawful obstruction in a thoroughfare, although that precise expression is not used, and the order made is precisely that required by Section 308. We can therefore have no doubt that the Magistrate at the time supposed himself to be acting under this last-named Section, which, if he be the Magistrate of a division

of a district, he is competent to do. The person complained of appeared and applied for a Jury, and it was the Magistrate's duty to proceed as directed in Section 310; but, instead of doing this, he at once made his order absolute, and directed the police to report whether the order had been carried out within a week. We do not concur with the Sessions Judge in thinking that an order might not be made in such a case under Section 62, for undoubtedly the Magistrate, if he thought such a direction tended to prevent obstruction to persons lawfully employed, might order any person to take action with the wall in his possession in the sense of removing it; and, if the order were disobeyed, and the obstruction anticipated were to arise, the person disobeying might be proceeded against under Section 188, Indian Penal Code. If convicted, he might appeal, or might bring his case before this Court by motion, and the validity of the proceedings would then be enquired into. But we think that the Joint Magistrate, having commenced his proceedings under Section 308, was not at liberty to proceed otherwise than in conformity with the rules laid down in Chapter XX. of the Code.

The 8th July 1867.

Present:

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges*.

Charge—Duty to give information.

Reference under Section 434, Code of Criminal Procedure, and Circular Order No. 7, dated 2nd June

Queen versus Moosubroo and another.

A charge should distinctly set forth the particular offence in respect of which the accused either omitted to give information, or gave information which he knew to be false; and it should appear precisely what his duty was in the matter.

Jackson, J. UNDER the circumstances, we think the commitment and the proceedings of the Magistrate of Monghyr must be quashed, and the case must be dealt with by the Magistrate within whose jurisdiction the offence charged appears to have been committed.

But, if the Sessions Judge, having jurisdiction, had tried the accused, we probably

Vol. VIII. should not have thought it necessary to interfere, as they would not have been prejudiced by the irregularity. We think it right to observe that the Magistrate's charge is very loosely and insufficiently drawn, as well as ill-expressed.

The charge should distinctly set forth the particular offence in respect of which the accused either omitted to give information, or gave information which they knew to be false; and it should appear precisely what their duty was in the matter.

The 9th July 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Confession—Culpable Homicide not amounting to murder—Adultery—Killing of wife and her paramour.

Queen versus Sheik Boodhoo.

Committed by the Deputy Commissioner, and tried by the Judicial Commissioner of Chota Nagpore, on a charge of murder.

A prisoner's confession must be taken in its entirety. Where a prisoner confessed that he did not suspect his wife's fidelity; that he left home on business; that on his return he saw what convinced him of his wife's infidelity; and that, maddened at the sight, he killed both her and her paramour—HELD that he was guilty of culpable homicide not amounting to murder, and that the case was one in which he ought to be treated with lenity.

J.—THIS prisoner was charged, *1st*, with the offence of murder, Section 302, Indian Penal Code; *and*, with the offence of culpable homicide not amounting to murder, Section 304.

The prisoner pleaded guilty to the second charge.

The prisoner made the following statement before the Judicial Commissioner of Chota Nagpore: "I had been married for ten years, and was unsuspicious of anything wrong in her conduct. I left home to collect some money due to me. After an absence of two days, I returned home, reaching it about 8 p.m. I looked through a small hole in the wall used for purposes of ventilation, and saw my wife and another man engaged in criminal intercourse with each other, a sight which so maddened me that I at once rushed inside, and despatched them

both with my dagger. I never suspected my wife's fidelity in the least. I always carry the weapon I committed the murder with when travelling. I looked through the hole in the wall before entering my house, because I saw a light in the house."

The Judicial Commissioner observes: "There is neither doubt nor question that the accused caught his wife and Bahadoor together under circumstances calculated to establish clearly the terms of intimacy they were on with each other, if indeed they were not actually engaged at the time in adulterous intercourse; but at the same time I am quite convinced that, when he returned home, he knew, with tolerable certainty, what he might expect to find going on. I do not believe that he sought or voluntarily provoked the provocation he received. I think he left home on *bond fide* business: that having reason to doubt the woman's fidelity, he watched her closely, and discovering how she was acting, he lost all power of self-control, and committed the crime he stands charged with. Considering, then, that the case falls under Exception I. of Section 300 of the Penal Code, but that the act by which death was caused was done with the intention of causing death or of causing such bodily injury as was likely to cause death, the Court finds that Sheik Boodhoo is guilty of the offence of culpable homicide not amounting to murder, and directs that he be rigorously imprisoned for ten years."

The prisoner appeals, urging that the Judicial Commissioner is wrong to assume a state of facts different from those stated by the appellant, in the absence of any evidence in support of the same; that, under the peculiar circumstances of the case, the sentence is altogether too severe.

No evidence was recorded by the Judicial Commissioner, the prisoner being convicted upon his own confession. In the absence of any evidence, the Judicial Commissioner was clearly wrong in assuming that the prisoner doubted his wife's fidelity, that he watched her, or that he knew with tolerable certainty what he might expect. The convictions of the Judicial Commissioner are not evidence, and they should not have been allowed to influence his opinion. The confession must be taken in its entirety. The prisoner tells us that he had been married to his wife for 10 years; that he had no reason to suspect her fidelity; that he left his home to collect money due to him; that on his return he saw what convinced him that

his wife was not as he had hitherto believed her to be; and that, maddened at the sight, he killed both her and her paramour.

For a crime committed under circumstances of such sudden and grave provocation, the gravest provocation that can be offered to a man, is the sentence passed by the Judicial Commissioner a proper or just sentence? We think not.

The prisoner is a Mahomedan, and so was the man who dishonored him. Under the Mahomedan Law, the prisoner's act would be justifiable homicide. *see* Beaufort's Digest of the Criminal Law, page 786, Section 3956.

In England, though the crime of which the prisoner has been guilty is not absolutely ranked in the class of justifiable homicide as in the case of forcible rape, it is manslaughter. It is, however, the lowest degree of it. *See* Commentaries on the Laws of England by Stephen, Vol. IV., page 135.

Under the Penal Code the prisoner is guilty of the offence of culpable homicide, for he intended to cause the death of his wife and her paramour; but inasmuch as he was deprived of the power of self-control by grave and sudden provocation, the offence committed by him is reduced to culpable homicide not amounting to murder. The punishment for the offence of culpable homicide not amounting to murder, if the act by which death is caused is done with the intention of causing death, is transportation of either description for a term which may extend to ten years. A fine may also be added. It will be observed that great latitude of discretion is given to the Jury in apportioning the punishment. The circumstances must be considered.

Now, it would be difficult to conceive a case in which the provocation was more grave than that offered to the prisoner. It is clear that he did not seek the weapon, that he acted wholly without premeditation and under the influence of his outraged feelings. Taking all the circumstances into consideration, this appears to us to be a case in which the prisoner ought to be treated with lenity. We therefore sentence him to one year's rigorous imprisonment from the date of the original sentence.

The 10th July 1867.

Vol. VIII.

Present :

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges*.

Trial by Jury.

Queen versus Khoodeeram.

Committed by the Magistrate, and tried by the Commissioner of Cooch Behar Division, on a charge of culpable homicide not amounting to murder.

Trial by Jury ceases in a district when the district ceases to belong to a division to which trial by Jury has been extended.

Jackson, J.—THE trial in this case has been held before the Commissioner of Cooch Behar Division, who is vested with the powers of a Court of Session. It took place in the District of Gowalparah, which was formerly comprised in the Assam Division, but now belongs to that of Cooch Behar, and was conducted with the aid of a Jury. Trial by Jury has not been extended to the Cooch Behar Division, but it appears that trials continue to be held with a Jury in Gowalparah, on the ground that trial by Jury was introduced into that district in common with other districts in Assam by order of the Local Government in 1862.

The notification, which appears in the *Calcutta Gazette* under date 28th March 1862, is to this effect: "It is hereby notified that, in conformity with Section 327 of the Code of Criminal Procedure, the Lieutenant-Governor has been pleased to order that, in all the districts comprising the Assam Division, the trial of all offences by the Court of Session shall be by Jury." There can be little doubt that the words "districts comprising the Assam Division" mean the "districts for the time being comprised in the Assam Division;" and that, when a district ceased to belong to that Division, trials would not be any longer by Jury under that notification. But the order which the Lieutenant-Governor actually made, and which is incorrectly given in the notification, is to be found in the Under-Secretary's letter to the Commissioner of Assam, No. 826, dated 28th March 1862, and is to the effect that "the trial of all offences by the Court of Session in Assam shall be by Jury." &c. This order would not authorize the Court of Session of Cooch Behar to hold trials by Jury in Gowalparah.

I.VIII. When a trial is by Jury under the Code of Criminal Procedure, the decision on facts is exclusively in the hands of the Jury: but, when it is with Assessors, the decision is vested exclusively in the Judge. In the case before us, therefore, the accused who ought to have been tried with Assessors was entitled to the decision of the Judge which he has not had.

The trial must therefore be quashed, and the accused must be tried anew according to law.

The 16th July 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Evidence—Confession—Section 366, Code of Criminal Procedure.

Criminal Referred Jurisdiction.

Queen versus Mussamut Jema.

A confession before the Magistrate, though afterwards retracted before the Sessions Court, is evidence against the party making it, under Section 366 of the Code of Criminal Procedure.

Glover, J. THERE appears to us no doubt of the prisoner's guilt. She was last seen with the deceased child, and she admitted to the neighbours, in the presence of the surburakar of the village, that she had killed the child by strangling him, and gave up the silver bracelets which Poddoh wore at the time of his disappearance.

When first examined by the Assistant Magistrate, she confessed in the same manner; and, although on being committed to the Sessions, she retracted her former admission, and said that the child had died from natural causes; her former admission is evidence against her under Section 366 of the Code of Criminal Procedure.

The medical evidence proves distinctly that the child was strangled.

We see no extenuating circumstances in this case, and confirm the sentence of death passed by the Sessions Judge.

The 18th July 1867.

Present :

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges.*

Conviction (Reasons for).

Criminal Revisional Jurisdiction.

Reference under Section 434, Act XXV. of 1861.

Queen versus Peari Raur.

A conviction ought not to be reversed by reason merely of the weakness of the reasons assigned for it when there is ample evidence of the guilt of the prisoners.

We think there is no sufficient reason for interfering with the order of the Magistrate as recommended by the Sessions Judge in this case.

The complainant stated that he left a quantity of valuable property locked up in a room of a house, of which the man Gopal and the woman Peari were the sole occupants

On his return home he found his room and his boxes broken into, and the contents either missing, or in possession of the man Gopal, or on the person of the woman Peari.

Persons, his relatives or neighbours, well competent to judge and not discredited, swore to the property as his.

In his presence, and in the presence of other persons, neighbours and not discredited, the accused persons admitted their guilt, and Gopal offered to compromise the matter, and actually entered into negotiations to that end; and the defences made respectively by Gopal and Peari were not in themselves worth anything, and were not sustained by evidence.

Independently, therefore, of that which was treated as, but which the Judge has rightly said was not, evidence against the accused, we think there was sufficient evidence to convict Peari, not of dishonestly receiving only, but of theft, if not of house-breaking.

We also think the male prisoner's conviction ought not to have been reversed by the Sessions Judge. Although the judgment of the Deputy Magistrate does not state

very satisfactory reasons for convicting the prisoners, the record contains ample evidence against them, and we consider that, where this is the case, the conviction ought not to be reversed by reason merely of the weakness of the reasons assigned for it.

There is some truth in the Sessions Judge's observation that the evidence established theft rather than mere guilty receipt of stolen property. But that would be no reason for setting the accused at liberty.

We observe also that the Sessions Judge has further directed the whole of the property found upon the prisoners to be returned to them. This appears to us wholly unaccountable, because the evidence clearly showed it to belong to the prosecutor; and, even if the Sessions Judge's view be adopted that Gopal Churn had made use of it without the complainant's permission, it seems an extraordinary denial of justice to restore to the wrong-doer property which manifestly was not his.

The 22nd July 1867.

Present :

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges*.

Commitment (by Sessions Court of an accused person discharged by Magistrate).

Criminal Revisional Jurisdiction.

Queen versus Neetie Dulal.

Where a Magistrate used the words acquittal and release when he intended only to discharge a person accused of an offence not triable by him—HELD that the Court of Session was competent, under Section 435, Code of Criminal Procedure, to order a commitment of such accused person.

Jackson, J.—THIS case has been argued with much ability by Mr. W. Jackson, the Counsel for the petitioner. But it appears to me that the order of the Court of Session must in substance be affirmed.

The argument of the learned Counsel proceeded very mainly with two impressions that appear to me to be mistaken.

It is supposed, *first*, that the Deputy Magistrate considered himself to be dealing with an offence within his own jurisdiction; and, *secondly*, that he acquitted the prisoner of such offence. Now, it is true that the judgment given by the Deputy Magistrate in this case is expressed with singular inexactness of language, and might well bear the interpretation which has been put upon it. But it appears to me, looking at the whole of the judgment, and also looking at the proceedings which took place, that the Deputy Magistrate in point of fact thoroughly understood what the nature of the offence imputed to Neetie Dulal was that he knew that offence to be an offence under Section 326 of the Indian Penal Code, namely, the offence of causing grievous hurt with a dangerous weapon (being a sword); and that, although he has used the words acquittal and release of the accused, he intended only to discharge.

It appears to me that, if the Deputy Magistrate had understood himself to be dealing with an offence within his cognizance, he would, as directed in the 14th Chapter of the Code of Criminal Procedure, before entering upon the defence of the accused person and hearing his witnesses, have recorded a charge and proceeded in the mode prescribed by Sections 250 and 251. On the other hand, in the procedure under the 12th Chapter, the Magistrate may, after hearing the evidence for the prosecution, examine the accused person, and also summon and hear evidence in his behalf before he proceeds to record and exhibit the charge.

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el.VIII. In this case, therefore, as the Magistrate has not framed or read any charge to the accused after taking his examination, and hearing witnesses in his defence, I think we must come to the conclusion that the Magistrate found himself to be in the position stated in Section 225, that is, when he finds that there are not sufficient grounds for committing the accused person to take his trial, and he thereupon abstains from framing any charge, and at once discharges the prisoner. There have been cases in which, upon the Magistrate dealing with evidence such as that before us, and convicting the accused person erroneously upon a minor charge instead of a graver charge which the evidence would support, and upon such cases coming in appeal before the Sessions Judge, and the Court of Session quashing that conclusion, and ordering a commitment upon the graver charge, this Court has set that order aside. That, it seems to me, is quite a distinct case from the present. In such a case the Sessions Judge undoubtedly assumes a function which does not belong to him, and his order is necessarily set aside for want of jurisdiction. But in this case it appears to me that the Court of Session, whether upon the information of the prosecutor or upon any other suggestion, has made an order which is entirely within his jurisdiction. Section 435 provides: "That, in the case of offences not triable by the Magistrate, the Court of Session may order the commitment to the Court of Session of any accused person who may have been discharged by the Magistrate."

This clearly was an offence, as described by the Magistrate, not triable by him. It was a case in which grievous hurt of a serious character had been inflicted by a sword, and in which several parties present and concerned in the riot had been armed with lethal weapons; consequently, in a case of that kind, it was open to the Court of Session to order the commitment of the prisoner Nectie, who was charged with that offence.

It has been suggested, and strongly urged by the learned Counsel, that the orders of the Sessions Judge in this case are opposed to the meaning of Section 55 of the Code of Criminal Procedure. The words of that Section are: "A person who has once been tried for an offence, and convicted or acquitted of such offence, shall not be liable to be tried again for the same offence." Now, if the person had been tried, and either con-

victed or acquitted of the offence described in Section 326 of the Indian Penal Code, this Section 55 would clearly apply. But it appears to me that he had not been tried; he has undergone only a preliminary enquiry relating to that offence; and, as the result of that preliminary enquiry, he has been discharged. Although in my opinion the order of the Sessions Judge was warranted by law, directing the commitment of this petitioner to take his trial, it occurs to me, and also to my brother Hobhouse, that the Judge has somewhat unguardedly committed himself to so strong an expression of his opinion in respect of the guilt of the petitioner, that it would be neither fair to the Judge himself, nor to the petitioner, to allow his trial to take place in the district of West Burdwan, and therefore it will be in accordance with the interests of justice if we direct his trial to take place in the district of East Burdwan.

Hobhouse, J.—I concur with my learned brother.

What it seems to me to be necessary to see in this case is what it was that the Magistrate thought he was enquiring into. He says that he finds it proved that a certain person was wounded by a sword-cut, and that the persons who wounded him were persons who wore deadly weapons, and that the wound was of that nature that it was grievous hurt by reason of the person upon whom it was inflicted having been in hospital, or at any rate suffering under the wound for 20 days. Therefore it seems to me that the Magistrate thought that what he was enquiring into was a charge of grievous hurt by means of some cutting instrument. That is a charge of an offence under Section 326 of the Indian Penal Code, and offences under that Section are not triable by the Magistrate, but by the Court of Session. Then Section 435 goes on to say that, in the case of an offence not triable by the Magistrate, the Court of Session may order the commitment of the accused person discharged by the Magistrate.

It seems to me therefore that, under Section 435, the Court of Session was right in directing that the accused in this instance should be committed and tried before it.

I also concur in the order that the case should be tried in East Burdwan.

The 22nd July 1867.

Present :

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges*.

Railway accidents—Duty of Guard.

Criminal Revisional Jurisdiction.

*Revision under Section 404, Code of Criminal
Procedure.*

Queen vs. R. Flood.

Where some coolies were employed in assisting a ballast train into motion at a Railway station, and one of them, after pushing the train, in getting up on the train, or in attempting to do so, fell and was so injured that he afterwards lost his life—*Held* that the evidence did not show that it was the duty of the guard to see that no one got up on the train when in motion.

Jackson, J.—It appears to me that this conviction ought to be set aside.

The petitioner was convicted by the Magistrate on a charge "that he, being a guard in charge of a ballast train, and as such amenable to the Regulations of the Railway Company, and thereby being bound to exert himself to prevent any breach of the bye-laws by passengers or others, did negligently omit to exert himself to prevent certain coolies, being persons about to proceed by a ballast train, from entering the aforesaid train after it was in motion already, one of them through falling under the train sustained serious injury which resulted in his death, and that he has thereby committed an offence punishable under Section 26, Act VIII. of 1854." On appeal to the Court of Session, the Sessions Judge stated: "There is a clear breach of the bye-laws, especially Section 12, Clause 5, and Section 11, Clauses 6 and 20, and he is rightly convicted, under Section 26 of Act XVIII. of 1854, in having negligently and wilfully omitted to do what he was legally bound to do, and by which omission the lives of the coolies travelling in the carriages, and the coolies on the line, were endangered."

The first and principal objection raised by the vakeel for the petitioner in this case is that the petitioner has been convicted under

Section 26, Act XVIII. of 1854, for having neglected to do something which he was legally bound to do; that Section 29 interprets the expression "legally bound to do" something as meaning the obligation of a Railway servant to do every thing necessary for or conducive to the safety of the public, and which he shall be required to do by any Regulation of the Company allowed by the Governor-General of India in Council, and of which Regulation such officer or servant shall have notice; but that, notwithstanding this, there was no evidence whatever to shew the existence of any Regulations so made and allowed by the Governor-General in India, or that the petitioner had notice of such Regulations, or that the act charged was a breach of such Regulations. Manifestly, in order to establish an offence under this Section, it would be absolutely necessary to give evidence of such Regulations. The Magistrate having omitted to take evidence upon that point, it would be competent to the Appellate Court, under Section 422 of the Code of Criminal Procedure, to direct additional evidence to be taken upon that point; and, if this were the sole objection to the conviction raised before us, I think it would be our duty to order the Appellate Court, the Court of Session, to exercise the power which it possessed under Section 422, and to direct a further enquiry to be made upon that point, so that the prosecution might be enabled to show that there were such Regulations, and that the prisoner committed a breach of them because, if the petitioner had clearly committed an act which was punishable, it would not, I think, be right that he should be allowed to escape by reason merely of the omission of the prosecutor to put the Regulations in evidence. But, upon careful consideration of the evidence in this case, it appears to me that, if the Regulations which have been referred to before us were put in evidence, they would not establish the commission by the petitioner of any offence. From those parts of the Regulations or bye-laws which I have heard read, it appears to be the duty of the guard, and the petitioner held the situation of guard, to take charge of trains when in motion, and apparently it would be his duty to take all precautions prescribed by the Regulations to prevent danger to passengers or others while the train was in motion. It does not appear to be the duty of the guard to take those precautions, nor is the train under his special control, while at the station. Apparently it is the

VIII. duty rather of the Station Master; at any rate, it is not shown to be the duty of the guard. Now, the evidence in this case shows that, when the train was started, the Station Master was apparently present on the platform.

This seems to point to the responsibility resting upon some one else rather than with the petitioner, but I think that we may go further than that. It seems to me that the Legislature, in enacting the Sections referred to, had chiefly in view the protection of the public, and especially of passengers and other persons not directly connected with the Railway, and I very much doubt whether it was the intention of the Act to make the officers responsible for risks to fellow-servants arising out of the particular duty in which they are engaged.

Now, these coolies of whom the deceased person was one were persons actually employed upon the ballast train in question. That train was at first in the siding. To come upon the main line from that siding, the train had to pass over a curve. It appears from the evidence that the engine was not a powerful one, that the grease in the axle-boxes had become congealed, and that consequently the engine from these united causes was unable to overcome the resistance which the curve line presented, and it was necessary to employ the coolies for the purpose of putting the train in motion. There seems to be no reason why coolies employed upon the ballast train, presumably accustomed to work of this description, should not be allowed to move the ballast train any more than they should be allowed to move any other heavy body. By the agency of their coolies, the train was moved from the siding into the main line. Then it appears to have been brought to a stand-still, and after that a signal was given for the train to start.

There is some conflict of evidence as to whether the train was started again with the assistance of the coolies or not. Probably the coolies did assist.

The guard denies, and the engine-driver denies, that he gave any orders for the coolies to push the train upon this occasion. It seems quite probable that the coolies did not receive direct orders from the guard. Then, is he answerable for the fact that they did so assist? It appears to me that he is not. At any rate not answerable under this Act. The Station Master was present, and this happened therefore under his eye, and I

should rather say on his responsibility. I say this of course merely for the purpose of showing that, in my opinion, the guard was not directly responsible. Whether, therefore, the coolies actually assisted in the starting of the train or not, it appears to me that the accident which occurred was one for which the petitioner was not responsible. It is quite clear that it will occasionally happen in the case of an engine of defective power that manual labor of some kind will be required to start the train. Then, if the engine is to be stopped, and the coolies are to mount upon the carriages before the train gets into motion, it is quite evident that they will have to get down again and so on *ad infinitum*, or else the train will never be got into motion at all. I therefore think that we ought not to direct a further enquiry, with a view to the Regulations and the sanction of them by the Governor-General being put in evidence, but that the evidence discloses no case against the petitioner, and that the conviction ought to be set aside.

Hobhouse, J.—I concur that this conviction must be set aside.

I will take those facts of the case which I consider to be most against the prisoner, and I still think that there is not sufficient evidence to convict him of the offence with which he was charged. I will take the facts to be that, when the train in this instance was upon the main line, a certain number of coolies, amongst whom was the person who was so injured that he afterwards lost his life, that a certain number of coolies were employed in assisting the train into motion. I will then take the facts to be that the person who was injured, after pushing the train with a number of others for a certain distance, got up upon the train, or attempted to do so while it was in motion, and that he thereby fell, and was injured. Then the question seems to me to be this, was any body, or rather was the accused in this instance, the person whose duty it was to start the train, and was it also his duty, before starting the train or at any other time, to see that, when the train was in motion, this particular person and others who were pushing the train did not get upon it? It seems to me that, if it was his duty in the first instance to have started the train, and then to have seen that no one got upon that train at the time when it was in motion, then undoubtedly it would have been by the omission of that duty that this particular cooly in this instance lost his life. But looking to the evidence, and especially to

the evidence of a person named Lall Behary, it appears to me that the prisoner in this instance was not the person whose duty it was to start the train, or to see that no persons got upon it while it was in motion; and that, if there were any such person so far as the evidence goes, it was not the prisoner, but rather the person above named, *viz.*, Lall Behary. At any rate, it is quite clear to me that the evidence, if there was any evidence, against the prisoner which would have proved that this was his duty, and that he had neglected it, was the evidence of certain bye-laws which were not put in evidence at all, and of which it was not shewn, as it should have been as the law prescribes, that the prisoner was cognizant.

For these reasons I concur that this conviction must be set aside, and the fine remitted.

The 22nd July 1867.

Present :

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges*.

Municipal Act—Nuisances.

Criminal Revisional Jurisdiction.

Revision under Section 404, Code of Criminal Procedure.

Queen versus Brojo Lall Mitter.

The occupier who suffers the land to be in a filthy state is the person liable for the penalty.

Jackson, J.—THERE is nothing on the record before us to show that the petitioner is not the occupant of the land; but as Mr Haldane, the Vice-Chairman who appears on behalf of the Municipal Commissioner, admits, for the sake of obtaining an expression of the Court's opinion, that there was an occupier, we proceed to give our decision in the case stated.

It appears to me that the occupier who suffers the land to be in a filthy state is the person liable for the penalty, because the words "owner and occupier" are only words qualifying the main proposition, which is, "Whoever suffers any house, building, or land in or near any public highway to be in a "filthy state."

Therefore, when land has been leased by he owner to some one else who is an occupier, the Commissioners ought to proceed against the occupier. I am therefore of opinion, supposing the fact to be, as stated in the petition, that the petitioner was wrongfully convicted, that the fine ought to be refunded.

Hobhouse, J.—I concur.

The 24th July 1867.

Present :

The Hon'ble L. S. Jackson and C. P.
Hobhouse, *Judges*.

Discharge—Acquittal—Jurisdiction.

Criminal Revisional Jurisdiction.

Reference under Section 434, Act XXV. of 1861.

Queen versus Bipro Doss.

Where there is no *prima facie* case against an accused, and he has not been put on his defence, nor any charge preferred against him, he should be discharged, and not acquitted.

The Court pointed out the necessity of a Court showing its jurisdiction and competency on the force of all its proceedings.

Jackson, J.—THIS purports to be a reference under Section 434, Code of Criminal Procedure, and is made by the Officiating Deputy Commissioner of Cachar, who appears to be vested with powers under Section 1, Act XV. of 1862.

This officer cannot apparently act as a Court of Session under Section 434, but he may act as a Magistrate, and this Court may (Section 404), "on the report of a Court of Session, or of a Magistrate, or whenever it thinks fit," call for proceedings, and pass such order as to it shall seem right.

The mode in which these references are to be made is prescribed in Circular Order No. 18, dated 15th July 1863. The directions contained in that order have not been complied with, and especially the explanation of the Lower Court has not been called for and transmitted.

It appears to the Court that, if this preliminary step had been taken, the reference might have been avoided.

VIII. The Lower Court was that of Mr. J. Birkmyre, Assistant Commissioner of Cachar. Nothing is said as to the powers exercised by this officer; but it may be assumed that he had such of the powers of a Magistrate as enabled him to try the offence of which Bipro Doss was accused, namely, theft (of a cow).

The case came on for hearing, and the complainant Nilnauth and two witnesses were examined. The Assistant Magistrate then recorded his opinion that there was "not the slightest proof that the accused Bipro Doss received or retained with guilty knowledge the cow which Nilnauth, the complainant, claims as his property."

He went on to say, "The Court finds that Bipro Doss is not guilty," acquits Bipro Doss, and directs that he be *discharged*.

There is, no doubt, an error in recording the verdict of acquittal, as the accused had not been put on his defence, and no charge had been preferred. The Court, however, are inclined to think that the Assistant Commissioner intended to deal with the case under the 250th Section, which directs that, when there is no *prima facie* case against the accused, he shall be *discharged* without any charge being preferred, and it is probable that the call for an explanation would have elicited this.

On perusal of the evidence recorded, the Court entirely agree with the Assistant Magistrate that there was nothing whatever to show that the accused had been guilty of any offence.

But the proceedings exhibit beyond this a very serious defect of form to which it is necessary to call the attention of the Assistant and of the Deputy Commissioner.

There is nothing from beginning to end of the proceedings before Mr. Birkmyre to show that the trial took place in any Criminal Court, or otherwise than in presence of a private person.

The Court must point out the necessity of showing the jurisdiction and competency of the Court on the face of the proceedings.

Every act of the Court, and all evidence recorded, ought to indicate that it was done and recorded before a Court or person exercising certain powers under the Code of Criminal Procedure. When this is not disclosed, it is impossible to assume the existence of jurisdiction.

The Assistant Commissioner gave judgment on the 13th June, and the complainant appears to have immediately preferred an appeal (contrary to Section 407 of the Code of Criminal Procedure) to the Deputy Commissioner, who received it, and called for the proceedings. It is true that he has not interfered with the order of the Court below, but he ought to have proceeded from the commencement, if at all, under Section 434, that is, supposing the Assistant Commissioner to have been a Magistrate directly subordinate, and the proceedings should have been submitted to this Court through the Sessions Judge.

So much of the Assistant Commissioner's order of the 13th June as purports to acquit the accused Bipro Doss is hereby set aside, and the discharge of him by the Magistrate will be no bar to further proceedings against him, if additional evidence should be discovered.

The 25th July 1867.

Present:

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges*.

Jurisdiction.

Criminal Revisional Jurisdiction.

Reference under Section 434, Act XXV. of 1861, and Circular Orders, dated the 15th July 1863, No. 18, and 2nd June 1864, No. 7.

Queen versus Doonda Bhooia.

Where a Magistrate committed to the Court of Session for an offence cognizable by himself, but which (by explanatory note 3rd prefixed to the schedule annexed to the Code of Criminal Procedure) the Court of Session was competent to try, and it appeared convenient that that Court should try and pass sentence on the accused, the High Court declined to interfere.

Hobhouse, J.—THE offence is doubtless cognizable by a Magistrate; and, under ordinary circumstances, he would be wrong to commit for such an offence to the Court of Session.

But, inasmuch as, by the 3rd explanation (note prefixed to the Schedule annexed to the Code of Criminal Procedure), the Court of Session is competent to try the accused, and as it appears in this case to be convenient that it should try the accused, and pass sentence in respect of both the offences with which he is charged, the Court do not think it necessary (if possible) to interfere.

The 27th July 1867.

Present :

1. Hon'ble Sir Barnes Peacock, *Kt.*, Chief Justice, and the Hon'ble G. Loch, H. V. Bayley, F. B. Kemp, W. S. Seton Karr, J. B. Phear, and A. G. Macpherson, *Judges*.

Murder—Culpable Homicide not amounting to Murder—Riot—Powers of High Court—Lumping of offences.

Criminal Appellate Jurisdiction.

Queen *versus* Sheikh Bazu and others.

Committed by the Magistrate, and tried by the Sessions Judge of Mymensingh, on a charge of culpable homicide not amounting to murder, &c.

Culpable homicide is not murder, unless the case comes expressly within the provisions of Clauses 1, 2, 3, or 4 of Section 300 of the Penal Code.

Under Section 209, an offence may amount only to culpable homicide, not murder, although none of the exceptions specified in Section 300 are applicable to the case.

An express finding by the Sessions Judge that the case does not fall under any of the Clauses of Section 300 is tantamount to an acquittal of murder; and after such an acquittal, the High Court cannot, either as a Court of Appeal or a Court of Revision, look at the evidence for the purpose of reversing the acquittal and of convicting the prisoner of murder.

There had been a riot and fight between two factories—and some members of one party (A) were charged with the murder of the leader of the other party (B), and some members of the other party (B) were charged with causing grievous hurt to the leader of A—HELD that the members of each party should have been committed for trial separately, and that the Magistrate was wrong in committing the members of party (A) and of party (B) for trial all together upon joint charges as if they had had one common object.

This case was referred to a Full Bench by Loch and Macpherson, JJ., under the following orders :—

Loch, J.—It appears to me that the Judge's finding in this case, in regard to the prisoners Moti Mondul, Seeboo, and Megha, is incorrect. He says in effect that they had no intention to kill Solim. but that they must have known that they were likely by what they did to cause death. They were, therefore, clearly guilty of culpable homicide. Culpable homicide is not murder if accompanied by any one of the exceptions mentioned under Section 300. If one or other of those exceptions exist, the case falls under

Section 304 (culpable homicide not amounting to murder); and when this offence has been committed without intention, but with knowledge that death may be the result of the act done, the punishment is limited to imprisonment, or fine, or both. Now, in this case, none of the exceptions exist to take the case out of the category of murder, of which the prisoners should have been convicted. The finding appears to me to be incorrect, and the sentence of five years' imprisonment to be illegal.

I see no objection to the sentence passed on Bazu, and would confirm it.

Macpherson, J.—It appears to me that, so far as the appeal of Moti Mondul, Seeboo, and Megha, is concerned, they have nothing to complain of in the sentence which has been passed upon them. On the contrary, they have been convicted of an offence less heinous than that proved against them: for in my opinion the offence which they committed amounts to murder, and the sentence passed upon them ought to have been that of transportation for life, instead of imprisonment for five years.

The prisoners are charged (among other charges) with the murder of Solim. There is, on the evidence, no doubt whatever that Solim died from the effects of a blow on the head which he received in the course of a riot in which the prisoners took part; but it is not proved who struck the fatal blow. No reliance is to be placed on the statements made by most of the witnesses. And indeed there is but little evidence as to what occurred upon the occasion of the riot, beyond the fact that when the Police, on information received from the prisoner Bazu (who had himself been wounded), repaired to the spot, they found Solim lying senseless on the ground, with Moti Mondul lying not far off with several very severe sword-cuts—Seeboo and Megha being also there, and wounded, though less severely. From the statements made by the prisoners themselves, as well as from other evidence, it sufficiently appears that quarrels accompanied by litigation had for some weeks been going on between Moti Mondul and the deceased. They lived in the same village, and all the villagers appear to have taken the side of either the one or the other.

Of the particular riot in the course of which Solim received the blow of which he died, the Judge says: "It would appear that the common object on Moti Mondul's side was to put an end to the case Solim

Vol. VIII. "had brought, and to punish him and his witnesses. Murder probably was never intended, but Solim met his death in the riot."

The Judge's finding as to the prisoners Moti Mondul, Seeboo, and Megha, is as follows: "I find that they were members of the same riotous party which, in prosecution of a common object, caused the death of Solim. I find no intention to cause death proved. I am unable to state with what weapon Solim was killed. I consider the crime does not come under any of the Clauses in Section 300, but think that there must have been a knowledge that death was likely to result from the proceedings in this riot, and I consider the prisoners all equally guilty under the latter part of Section 304, and sentence each of them to five years' rigorous imprisonment." The conviction is for culpable homicide not amounting to murder, the Court holding that the prisoners caused the death of Solim by acts done "with the knowledge that their acts were likely to cause death, but without any intention to cause death, or to cause such bodily injury as was likely to cause death."

I have gone carefully through the whole of the evidence on the record, and I find nothing which makes me doubt the correctness of the Judge's finding upon the facts. Upon those facts, however, I think that the conviction ought to have been for murder, for they bring the case directly and clearly within the 3rd Clause of Section 300.

The Judge has found specifically that the prisoners had neither the intention nor the knowledge necessary to bring the offence within the first or the second Clause of Section 300; but he does not find specifically that they had not the intention necessary to bring the offence under the 3rd Clause. The Judge, in an earlier part of his judgment, says generally that he does not consider the offence comes under any of the Clauses of Section 300. But in the formal finding at the end, he declares (without naming Section 300) that there was no such intention or knowledge as would bring the offence within the first or second Clauses, but does not declare that there was not such an intention as would bring the offence under the 3rd Clause. But the 3rd Clause, as it appears to me, expressly applies to the facts found, and upon the facts which he

found the Judge was wrong in law in not applying this Clause, and convicting the prisoners of murder.

Omitting the first and second Clauses of Section 300, the Section runs thus: "Except in the cases hereafter excepted, culpable homicide is murder if the act by which the death is caused is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death." And annexed to the Section, we have this illustration (c): "A intentionally gives Z a club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death."

The present case falls directly within these words. The medical evidence proves that Solim died from the effects of one blow by which his skull was fractured, and that in all other respects the body was in a healthy state. He, therefore, as is in fact found by the Judge, received a wound "sufficient to cause the death of a man in the ordinary course of nature;" and, in the absence of any evidence to the contrary, the presumption is that the person who inflicted the wound intended to inflict it, "although he may not have intended to cause Solim's death." The offence therefore is murder, unless one or other of the exceptions to Section 300 are applicable. But none of them apply. There had been frequent quarrels and some personal violence used between the parties on previous occasions. When Solim was struck down, the prisoners were all of them members of an unlawful assembly, the common object of which was the punishing of Solim and his supporters. In the "prosecution of the common object of that assembly," as expressly found by the Judge, Solim received a blow on the head of which he died. Reading Section 149 of the Penal Code with Section 300, all the three prisoners are guilty of murder.

The question, then, arises whether, acting as a Court of Revision under Section 405 of the Code of Criminal Procedure, we ought to reverse the conviction and sentence, and to declare that the prisoners are guilty of murder, and must be transported for life.

I am inclined to think that we ought, following the rule laid down in *Gorachand*

